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PETITION FOR A WRIT OF CERTIORARI

Petitioners Grand Trunk Western Railroad Incorporated, Tracey Miller, Laurence T. Wizauer, David Cromie, Peter Brandon, Thomas Willett, and Lawrence R. Martenis respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App. 1a-14a) is reported at 395 F.3d 318 (6th Cir. 2005). Both the district court's order denying respondent's motion to remand (App. 15a), and the transcript containing its bench ruling in support of that order (App. 16a-27a), are unreported, as is the district court's memorandum opinion and order granting petitioners' motion for summary judgment (App. 28a-41a).

JURISDICTION

The judgment of the court of appeals sought to be reviewed was entered on January 14, 2005. The court of appeals denied a timely petition for rehearing on March 15, 2005. (App. 47a-48a.) Petitioners' time for filing a petition for certiorari was extended by Justice Stevens as Circuit Justice until July 13, 2005. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

This case concerns 28 U.S.C. §§ 1331 and 1441, and Sections 1, 1a and 3 of the Railway Labor Act, 45

U.S.C. §§ 151, 151a and 153, all of which are reproduced in the Statutory Appendix (App. 49a-74a).

STATEMENT OF THE CASE

i. Statutory Background

This case concerns the Railway Labor Act of 1926 ("RLA"), as amended, 45 U.S.C. §§ 151, *et seq.* In the RLA, Congress established a comprehensive regime that governs employment under collective bargaining agreements ("CBAs") throughout the U.S. railroad and airline industries.[1] That regime serves the critically important national purpose of minimizing the risk that railroad or airline labor disputes could lead to "any interruption to commerce or to the operation of any carrier engaged therein." *Id.* § 151a(1). To that end, "Congress endeavored to promote stability in labor-management relations . . . by providing effective and efficient remedies for the resolution of railroad-employee [and airline-employee] disputes arising out of the interpretation of collective-bargaining agreements." *Union Pac. R.R. v. Sheehan*, 439 U.S. 89, 94 (1978).

In Section 3 of the RLA, Congress provided an exclusive federal system, founded on "compulsory arbitration procedures," *Consol. Rail Corp. v. Ry. Labor Execs. Ass'n*, 491 U.S. 299, 303 (1989), "for the prompt and orderly settlement of all disputes growing out of grievances or out of the interpretation or

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[1] In 1936 Congress extended the RLA to the airline industry. *See* 45 U.S.C. §§ 181-88. Both the railroad and the airline industries are adversely affected by the decision of the court of appeals in this case and by the split in the circuits over the question presented.

application of [CBAs]," 45 U.S.C. § 151a(5).[2] Such disputes are known as "minor disputes." *See, e.g., Elgin, Joliet, & E. Ry. v. Burley*, 325 U.S. 711, 723-24 (1945); *Hawaiian Airlines, Inc. v. Norris*, 512 U.S. 246, 256 (1994) (further defining minor disputes as disputes that "involv[e] the interpretation or application of existing labor agreements").[3] Because arbitration is mandatory, any claim brought under state law that "constitute[s] a minor dispute" is preempted by the RLA. *Id.* at 253.

This case presents an issue that now divides nine of the courts of appeals along a six-to-three split: whether federal courts have federal question jurisdiction over a claim pled under state law that involves interpretation or application of a CBA subject to the RLA and hence constitutes a minor dispute

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[2] Specifically, Section 3, First of the RLA establishes the National Railroad Adjustment Board ("NRAB"), and provides that all such disputes that cannot be resolved consensually are to be referred to it, *id.* § 153, First (i), to regional adjustment boards sitting under authority delegated by the NRAB, *id.* § 153, First (x), or to similar system, group or regional boards (including public law boards) established by voluntary agreement between railroad employers and unions, *id.* § 153, Second. Adjustment board awards are both enforceable and reviewable in federal district court. *Id.* § 153, First (p) & (q).

[3] "Minor disputes" are distinguished from "major disputes" not by their scope or importance – minor disputes frequently involve industry-wide issues affecting the terms under which railroad or airline employees are employed – but by their relationship to CBAs. Any dispute involving the interpretation or application of an existing CBA is "minor," whereas a dispute arising "out of the formation or change of" a CBA is "major." *Detroit & Toledo Shore Line R.R. v. United Transp. Union*, 396 U.S. 142, 145 n.7 (1969).

subject to mandatory arbitration under Section 3 of the RLA, 45 U.S.C. § 153.

That issue arises when an employee files a state law claim against a railroad or airline employer and seeks relief from a state court instead of, or (as in this case) in addition to, filing the grievance before the adjustment board.

Six circuit courts have held that there is federal question jurisdiction over the employee's state law claim if it involves interpretation or application of a CBA subject to the RLA. As a result, district courts in those circuits are available, upon removal, 28 U.S.C. § 1441, to determine whether the claim constitutes a minor dispute and, if so, to enforce the exclusivity of the RLA-specified mechanisms for resolving such disputes.

Three circuit courts, including the Sixth Circuit in this case, have held that there is no such federal question jurisdiction. Therefore, the determination of what constitutes a minor dispute and enforcement of the federal dispute resolution system are left to the state courts within those circuits.

ii. Statement Of Facts

Petitioner Grand Trunk Western Railroad Incorporated ("GTW") operates railway lines in Michigan and three other states. GTW is a part of the railway system of Canadian National Railway ("CN"), which operates coast to coast in Canada and south from Canada through sixteen states in the United States to the Gulf of Mexico. CN's lines run in states located in

the Second, Third, Fifth, Sixth, Seventh, Eighth and Eleventh Circuits. The CN system, including GTW, is an integral part of the U.S. freight railway network, connecting directly with the six other major North American freight railroads that operate within the United States. Together, the major railroads interchange freight with hundreds of smaller railroads. Railroads carry freight in every state, and the U.S. freight railway system, in turn, interconnects with the railway systems of Canada and Mexico and is an essential foundation of much of the United States and North American economies. The freight railroads in the United States also provide tracks and other infrastructure facilities used by Amtrak and other passenger lines.

Improper train operation poses significant safety risks that arise from both the size and speed of the trains and the hazardous materials that frequently are shipped by rail. Accordingly, GTW, like other railroads operating in the United States, is subject to the provisions of the Federal Railroad Safety Act of 1970 ("FRSA"), now codified as amended at 49 U.S.C. §§ 20101, *et seq.* Regulations promulgated by the Secretary of Transportation under the FRSA prohibit railroad employees such as respondent from using "a controlled substance at any time, whether on duty or off duty," 49 C.F.R. § 219.102, and subject railroad employers such as GTW to civil penalties for violating the "duty of due diligence to prevent" such on- or off-duty drug use, *id.* §§ 219.9(a), 219.105(b). *See generally Skinner v. Ry. Labor Execs. Ass'n*, 489 U.S. 602, 608 (1989) (noting "the obvious safety hazards of drug and alcohol use by railroad employees" addressed by FRSA regulations). Under these regulations, "[e]xisting

procedural rights with respect to employment remain unabridged," specifically, "investigation, grievance and adjustment under the collective bargaining agreement and section 3 of the Railway Labor Act, 45 U.S.C. 153." *Random Drug Testing; Amendments to Alcohol/Drug Regulations*, 53 Fed. Reg. 47,102, 47,107 (Fed. R.R. Admin. Nov. 21, 1988).

This case arises out of GTW's employment of respondent James T. Roddy ("Roddy"). As a conductor, Roddy operates a freight train for GTW, typically in concert with only one other person, an engineer. A conductor is responsible for directing train movement to assure employee and public safety. This includes such "safety-sensitive tasks," *Skinner*, 489 U.S. at 620, as directing the engineer in the operation of the train, coupling and uncoupling cars to and from the train, and operating switches that determine the track to be occupied by the train.

The terms of Roddy's employment, i.e., his rate of pay, rules and working conditions, are governed by a CBA with Roddy's union, the United Transportation Union ("UTU"). Pursuant to the CBA, GTW has exercised the right to promulgate work rules relating to personal conduct and controlled substances, including investigatory procedures and disciplinary sanctions. Disputes involving the interpretation and application of those rules are subject to mandatory arbitration under the RLA.

On July 11, 2000, less than three hours before he was to begin a conductor shift, Roddy was arrested on, *inter alia*, misdemeanor charges of possessing the controlled substances methylphenidate and marijuana

and resisting arrest. After police subdued him with pepper spray, Roddy was detained and jailed overnight. Approximately one hour before his shift was to begin, his wife called GTW to report that he was "unavailable for work" that night. Compl. ¶ 15 (J.A. 13).[4] Roddy's absence on short notice resulted in the train's delay. (J.A. 75.)

GTW investigated Roddy's failure to report for his shift. During that investigation, GTW obtained a copy of Roddy's arrest record. In accordance with the provisions of the CBA between GTW and UTU, GTW held an investigational hearing into both Roddy's connection with illegal drugs and his short notice to GTW of his unavailability for work, in violation of GTW work rules. (J.A. 69-96, 149-50.) Roddy was represented by a union official, also in accordance with the CBA. Based on the resulting record (*see* J.A. 69-96), GTW suspended Roddy for sixty days and required that, before he could return to service, Roddy had to undergo an Employee Assistance Program ("EAP") evaluation, comply with any resulting recommendations, obtain a release from the EAP counselor to allow for GTW's verification, and undergo a company medical examination that included a drug test. (J.A. 128, 220.) At this time, the criminal drug charges were still pending against Roddy. (J.A. 153, 191-93.)

Roddy refused to undergo the required EAP evaluation and also failed to satisfy any of the other requirements for his return to service. GTW convened

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[4] References herein to "J.A. __" are to the Parties' Joint Appendix filed with the Sixth Circuit in this case.

another investigational hearing pursuant to the CBA and found that Roddy's noncompliance violated GTW work rules requiring employee compliance with department managers' instructions applying to their duties. (J.A. 97.) GTW dismissed Roddy for violation of those rules. Roddy unsuccessfully appealed his dismissal within the GTW disciplinary process. (J.A. 97, 221-23.)

Roddy exercised his rights under the CBA and the RLA to challenge the investigation, hearing, and dismissal in binding arbitration. He sought reinstatement, pay for all time lost (including payment for "all benefits, privileges and rights lost") and "expunging [of] all notation of investigation from [his] work record." Award No. 15, NMB, Pub. L. Bd. No. 6441, Docket No. 1000-2001—UTU files, 4465-R-GTW files (Aug. 26, 2003) (App. 42a-43a).[5] The arbitration panel determined that it had "jurisdiction of the parties, claim and subject matter," *id.* at 43a, and that Roddy "is guilty of the charges." *Id.* at 45a-46a. Because Roddy was "[a] long term employee with an otherwise good work record," however, it reduced the discipline from dismissal to "suspension from service for a period of three (3) months and [Roddy] will otherwise be made whole for wages, benefits and his seniority date." *Id.* at 45a-46a.

[5] The adjustment board's award is a matter of public record. A copy is included as App. E (App. 42a-46a).

iii. Course Of Proceedings And Disposition Below

Prior to the arbitration award, Roddy also filed a complaint against GTW and the other petitioners (GTW officials) in Michigan state court, which covered much of the same ground as his RLA arbitration. Like Roddy's arbitration demand, the complaint stated that it concerned the "terms, conditions, or privileges of [Roddy's] employment." Compl. ¶¶ 17, 30.

The complaint asserted that GTW had violated a Michigan statute that prohibits an employer from requesting, making, or retaining a record of an employee's misdemeanor arrest if that arrest did not result in a conviction, Mich. Comp. Laws § 37.2205a (the Michigan "Elliott-Larsen" statute). Roddy alleged that "[at] all material times, Plaintiff [Roddy] was an employee, and Defendant GTW was his employer," Compl. ¶ 23, and that "[a]s a result of the Defendants requesting, making or maintaining of a record or information of [Roddy's] misdemeanor arrest and detention, Defendant, GTW, conducted a formal company investigation on a charge of possession of marijuana which were [*sic*] alleged to be in connection to the terms, conditions, or privileges of Plaintiff's employment," *id.* ¶ 17; *see also id.* ¶ 30, and eventually "terminate[d] [Roddy's] employment," *id.* ¶ 27. Among other relief, the complaint sought compensatory and exemplary damages based on Roddy's alleged "lost wages" and job benefits *(id.*, Prayer ¶ 3), an injunction to prevent GTW from imposing further discipline based on Roddy's arrest (*id.*, Prayer ¶ 5), and other relief paralleling his RLA arbitration demands, e.g., reinstatement (*id.*, Prayer ¶ 6), and an order requiring

GTW to destroy the records of its disciplinary proceedings arising from Roddy's arrest (*id.*, Prayer ¶ 7).

Petitioners filed a timely notice of removal, stating that Roddy's "rights, if any, with regard to [his] claims in this case are governed and controlled by the mandatory provisions of the [RLA]" in that "any dispute regarding his rates of pay, hours, or conditions of employment are [*sic*] subject to the mandatory provisions of the [RLA]," and that the District Court "has original jurisdiction of plaintiff's complaint in this matter pursuant to 28 U.S.C. § 1331." (J.A. 8.) Roddy moved for remand to the state court. (J.A. 42-44.)

In a bench ruling, the district court denied the motion to remand. The court reasoned that "there are certain areas in which there is complete preemption, and certain aspects of the Federal Railway Labor Act are included in those." (App. 19a.) Further,

> the issues involved in the minor dispute here are areas exclusively reserved to the administrative scheme of the Railway Labor Act, including the character, fitness and safety of the personnel to operate the equipment involved. . . . [T]he safety, character and fitness of the employees to operate the trains is a matter which needs to be fully considered within the administrative scheme [of the RLA].

(*Id.* at 26a-27a.)

In a written opinion, the district court granted petitioners' subsequent motion for summary judgment, concluding that:

> [Roddy's] state law claims are inextricably intertwined with interpretation of rights and obligations that exist under the parties' CBA; *i.e.*, whether [GTW] has the right to request, make, or maintain a record of information regarding an off-duty misdemeanor drug arrest that did not result in a conviction and whether [Roddy] has a right to impede access to this information or to refuse to answer questions regarding such an arrest.

(App. 37a.) Further, Roddy's state law claims could not "be resolved independently of the CBA" and federal regulations, and were "in direct conflict" with GTW's rights and responsibilities thereunder. *Id.* The District Court also relied upon the holding in *Gore v. Trans World Airlines*, 210 F.3d 944 (8th Cir. 2000), that "[u]nder the RLA, parties are obligated to arbitrate minor disputes, which are controversies arising out of the application or interpretation of the collective bargaining agreement, and therefore, complete preemption applies to disputes involving duties and rights created or defined by the collective bargaining agreement." *Id.* at 949 (quoted at App. 34a-35a).

On Roddy's appeal from both orders, the Court of Appeals for the Sixth Circuit found a conflict in the other circuits as to whether the RLA has "the extraordinary preemptive force necessary to create federal removal jurisdiction," App. 12a; *see id.* at 7a-13a (discussing cases), i.e., whether federal courts have federal question jurisdiction over a claim pled under state law that involves interpretation or application of a CBA subject to the RLA, and hence constitutes a minor

dispute subject to mandatory arbitration under Section 3. The court of appeals acknowledged that "[t]he RLA gives the National Railroad Adjustment Board exclusive jurisdiction over disputes that arise out of collective bargaining agreements," but discerned "no indication that [in the RLA] Congress intended for federal courts to acquire jurisdiction solely to ensure that minor disputes are redirected from the courts to the boards of adjustment." *Id.* at 9a-10a (citations omitted). On that basis, it held that state law claims that constitute minor disputes under the RLA fall outside federal question jurisdiction. It therefore reversed the denial of Roddy's motion to remand, vacated the grant of summary judgment based only on its finding that the district court lacked jurisdiction, and returned the case to the district court with instructions to remand it to the state court. (App. 1a-14a.)[6]

GTW filed a timely petition for rehearing with a suggestion for rehearing *en banc*. On March 15, 2005, the Court of Appeals denied rehearing. (App. 47a-48a.)

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[6] The district court, in turn, remanded to the Michigan circuit court, where no action has been taken. It is well-settled that such remand does not "defeat this Court's jurisdiction" or affect this Court's "authority to review" the decision of the court of appeals. *Aetna Cas. & Sur. Co. v. Flowers*, 330 U.S. 464, 466-67 (1947); *cf. Graddick v. Newman*, 453 U.S. 928, 945 n.* (1981) (Rehnquist, J.) (issuance of mandate or obedience to judgment does not bar review).

REASONS FOR GRANTING THE WRIT

The writ should be granted for three reasons:

1. The Sixth Circuit's decision places it on the minority side of a six-to-three circuit split on an important and recurring issue of federal law that likely will persist until resolved by this Court;

2. The Sixth Circuit's decision conflicts with decisions of this Court holding that (a) federal courts have federal question jurisdiction to enforce the RLA obligation to arbitrate minor disputes, and (b) Section 3 of the RLA has no less preemptive force than Section 301 of the Labor-Management Relations Act, 29 U.S.C. § 185, under which state court actions asserting arbitrable grievances are subject to federal question jurisdiction; and

3. The Sixth Circuit's decision is contrary to Congress's intent to make the federal courts available to enforce the RLA dispute resolution process.

I. The Sixth Circuit's Decision Places It On The Minority Side Of A Six-To-Three Circuit Split On An Important And Recurring Issue of Federal Law.

The Sixth Circuit's decision widens a split among the courts of appeals. It directly conflicts with decisions of the United States Courts of Appeals for the Second, Fourth, Fifth, Seventh, Eighth and Ninth Circuits, all of which have held that a state law cause of action that constitutes a minor dispute under the RLA "aris[es] under the . . . laws . . . of the United States."

28 U.S.C. § 1331. Two other courts of appeals, the Third and Eleventh Circuits, have preceded the Sixth Circuit in holding that RLA minor disputes do not implicate federal question jurisdiction when pled as state law causes of action.

In sum, nine circuits (plus numerous district courts[7]) have decided the issue, with six circuits determining the issue one way and three determining it the other. This circuit split undermines Congress's goal of uniformity and thereby also threatens the congressional goal of stability in rail and airline labor relations. Moreover, the uncertainty brought about by this circuit split is aggravated by the fact that the Nation's railroads and airlines face uncertainty as to the approaches to RLA matters that may be taken by the many state court judges in the ten states encompassed by the Third, Eleventh, and Sixth Circuits. This Court should grant certiorari in order to resolve this deep and long-standing conflict. *See* Sup. Ct. R. 10(a).[8]

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[7] For example, district courts in the First Circuit have also held, contrary to the decision below, that there is federal question jurisdiction over minor disputes pled as state law claims. *See, e.g., Burgos v. Exec. Air, Inc.*, 914 F. Supp. 792, 797 (D.P.R. 1996) ("removal from the Commonwealth court is appropriate, due to the RLA's complete preemption of state contract law in this matter"); *Sirois v. Bus. Express, Inc.*, 906 F. Supp. 722, 729 (D.N.H. 1995) ("[t]o deny removal under these circumstances would be to ignore Congressional intent" and "would jeopardize federal labor policies and encourage the proliferation of varying and inconsistent state court constructions of collective bargaining agreements"). The First Circuit itself has not addressed the issue.

[8] Other district courts have also recently noted the conflict among the courts of appeals. *See, e.g., Solimo v. Metro-North Commuter*

A. Six Circuits Hold That State Law Claims That Constitute Minor Disputes Under The Railway Labor Act Fall Within Federal Question Jurisdiction.

1. Seventh Circuit. In *Graf v. Elgin, Joliet & Eastern Railway*, 790 F.2d 1341 (7th Cir. 1986), the Seventh Circuit ruled that the RLA "so pervasively occupies the field of railroad labor disputes that a railroad worker's claim of wrongful discharge necessarily invokes federal law," *id.* at 1344, for which reason the claim comes within "federal-question jurisdiction under 28 U.S.C. § 1331," and "the district judge was authorized to decide whether Graf's claim of wrongful discharge is barred by the Railway Labor Act," *id.* at 1348. *See also Leu v. Norfolk & W. Ry.*, 820 F.2d 825, 829 (7th Cir. 1987) ("'Where the worker is covered by a collective bargaining contract and therefore has a potential federal remedy, judicial or arbitrable [*sic*], the cases hold that that remedy is exclusive; the worker has no state remedies.'" (quoting *Graf*, 790 F.2d at 1346)).

2. Fourth Circuit. In *Arbogast v. CSX Corp.*, 831 F.2d 290 (unpublished table decision), *reported in full at* 1987 WL 38662 (4th Cir. 1987), the

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R.R., 253 F. Supp. 2d 733, 735 n.1 (S.D.N.Y. 2003); *Chille v. United Airlines*, 304 F. Supp. 2d 466, 469 (W.D.N.Y. 2004); *Mersmann v. Cont'l Airlines*, 335 F. Supp. 2d 544, 552 (D.N.J. 2004). The conflict has also been discussed in academic literature. *See, e.g.*, Eric J. Moss, *The Breadth of Complete Preemption*, 76 Va. L. Rev. 1601, 1618-25 (1990); 16 James Wm. Moore *et al.*, *Moore's Federal Practice* § 107.14[4][b][v][D], at nn.265.1-.3 (3d ed. 1997 & Supp. 2005).

Fourth Circuit followed *Graf* in holding that the RLA's "minor dispute provisions convert a state law claim into a federal claim for purposes of removal jurisdiction." 1987 WL 38662, at **1. It therefore held that an action seeking penalties under a West Virginia statute for failure to pay wages promptly was properly removed to, and dismissed by, the district court; the penalties sought were derived solely from the state statute, but the duty sought to be enforced – the duty to pay wages – was created by the RLA-governed CBA.

3. Eighth Circuit. The Eighth Circuit has held in both *Deford v. Soo Line R.R.*, 867 F.2d 1080 (8th Cir. 1989), and *Gore*, 210 F.3d 944, that state law claims that constitute minor disputes are within federal question jurisdiction. It reasoned in *Deford* that the RLA "'pervasively occupies' the field of railroad labor disputes, completely preempting state law claims arising out of collective bargaining agreements." 867 F.2d at 1085 (citation omitted). The "RLA's preemptive force is so extraordinary that it takes over the whole field of railroad labor disputes arising from the collective bargaining agreement." *Id.*

4. Ninth Circuit. The Ninth Circuit has held that state law claims that constitute minor disputes "are completely preempted by the RLA," and thus cannot be remanded to state court. *Grote v. Trans World Airlines, Inc.*, 905 F.2d 1307, 1310 (9th Cir. 1990); *accord Beers v. S. Pac. Transp. Co.*, 703 F.2d 425, 427 (9th Cir. 1983) (affirming removal because "the functioning of the labor relations process under the RLA is the heart of the Act and an area of federal concern"); *Schroeder v. Trans World Airlines, Inc.*, 702 F.2d 189, 191 (9th Cir. 1983) ("The application of this

statute and the necessity of its interpretation establish the existence of a federal question as an essential element of plaintiffs' cause of action, providing the basis for removal.").[9]

5. Fifth Circuit. The Fifth Circuit has stated that federal question jurisdiction supporting removal would exist if the state cause of action asserted in state court constituted a minor dispute under the RLA. *Anderson v. Am. Airlines, Inc.*, 2 F.3d 590, 594 (5th Cir. 1993).[10]

6. Second Circuit. The Second Circuit has held that "[i]f the state claims put forward are in fact preempted by the RLA, the action may properly be removed to the federal courts, even when

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[9] The Sixth Circuit cited one Ninth Circuit case decided after *Schroeder* and *Beers* but before *Grote* to contend that "[t]he Ninth Circuit has also rejected a finding that a plaintiff's state law claims were completely preempted by the RLA." App. 10a. However, the pre-*Grote* case cited, *Price v. PSA, Inc.*, 829 F.2d 871 (9th Cir. 1987), made no reference to any CBA or to Section 3 of the RLA, 45 U.S.C. § 153, but rather addressed preemption based only on the organization and collective bargaining provisions of Section 2, Fourth of the RLA, 45 U.S.C. § 152, Fourth. More recently, the Ninth Circuit has reviewed a district court's preemption analysis in a minor dispute case after the defendant "removed the action to federal court asserting federal question jurisdiction based on [*inter alia*] the RLA," without suggesting any retreat from its holding in *Grote* that there is federal question jurisdiction over state law claims that constitute minor disputes. *Espinal v. N.W. Airlines*, 90 F.3d 1452, 1455 (9th Cir. 1996).

[10] The Fifth Circuit held that the particular state claims asserted in *Anderson* did not constitute minor disputes and therefore were not removable.

the plaintiff's complaint does not itself include a federal cause of action." *Shafii v. British Airways, PLC*, 83 F.3d 566, 569 (2d Cir. 1996).[11]

B. Two Other Circuits Preceded The Sixth Circuit In Holding That State Law Claims That Constitute Minor Disputes Under The RLA Fall Outside Federal Question Jurisdiction

1. Third Circuit. In *Railway Labor Executives' Ass'n v. Pittsburgh & Lake Erie R.R.*, 858 F.2d 936 (3d Cir. 1988) ("*P&LE*"), the Third Circuit held that state law claims that constitute minor disputes are outside federal question jurisdiction. It reasoned that Congress had "fail[ed] to create in the RLA a civil enforcement action" in federal court, and that there was no "affirmative evidence of a Congressional intent to permit removal despite the plaintiff's exclusive reliance on state law." *Id.* at 942-43.[12]

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[11] The Second Circuit held that the particular state claims asserted in *Shafii* did not constitute minor disputes and therefore were not removable. As a statement of the law in the Second Circuit, *Shafii* has been applied as the basis for removal of state law claims that do constitute minor disputes. *See Solimo*, 253 F. Supp. 2d at 735 & n.1 (holding such claims "ineligible for remand" because the Second Circuit "is clearly of the opinion that the RLA, like the Labor Management Relations Act ('LMRA') which it closely resembles, offers complete preemption and thus removal jurisdiction for artfully pled state law complaints in the RLA field").

[12] The Eighth Circuit in *Deford*, 867 F.2d at 1086, criticized *P&LE* as taking an "unnecessarily narrow" approach to the interpretation of congressional intent:

2. Eleventh Circuit. In *Geddes v. American Airlines, Inc.*, 321 F.3d 1349 (11th Cir. 2003), the Eleventh Circuit followed *P&LE* in denying federal question jurisdiction over state law claims that constitute minor disputes, because it could not discern any "indication that Congress intended for federal courts to acquire jurisdiction solely to ensure that minor disputes are redirected from courts to the boards of adjustment." *Id.* at 1354. The Sixth Circuit relied heavily on *Geddes* in the opinion below. *See* App. 9a-13a.

C. This Deeply Entrenched Conflict Will Likely Persist Until Resolved By This Court.

The issue of federal jurisdiction over minor disputes pled as state law claims has been percolating for almost two decades, and each circuit's position (except that of the Seventh Circuit in *Graf*) was reached following a contrary decision by at least one other circuit. For example, the Third Circuit ruled against such federal question jurisdiction in *P&LE* in 1988, and the Eighth Circuit ruled in favor of it in

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> Not only must we look to affirmative congressional intent and civil enforcement provisions, but we must also look to such factors as the history and purpose of the statute. Recent case law illustrating the federal nature of the statute and analogous statutes with complete preemptive powers are also informative. Having analyzed the RLA under this light, we conclude that it was Congress' intent that the RLA govern all railway labor disputes such as those in this case arising from collective bargaining agreements.

Deford in 1989, in an opinion explicitly eschewing *P&LE's* "unnecessarily narrow" approach. 867 F.2d at 1086.

This Court's review is likely the only avenue for resolving the conflict. It is unlikely that all six circuits that have ruled in favor of federal question jurisdiction will reverse their position. Their positions are long-standing and, as discussed below, there are good reasons for believing that federal question jurisdiction is consistent with Congress's intent in the RLA and with this Court's RLA precedents.

There also is little reason to expect a reversal of the position of the three circuits that have ruled against federal question jurisdiction over state law claims that constitute minor disputes. Indeed, they likely will have no opportunity to do so. District courts following circuit precedent in these circuits will remand to state courts for lack of subject matter jurisdiction, and such remands are "not reviewable on appeal or otherwise." 28 U.S.C. § 1447(d); *see Things Remembered, Inc. v. Petrarca*, 516 U.S. 124, 127-28 (1995).

II. The Sixth Circuit's Decision Conflicts With Relevant Decisions Of This Court.

The Sixth Circuit's decision is inconsistent with this Court's decisions that have long and consistently recognized that, in enacting Section 3 of the RLA, Congress intended federal courts to have jurisdiction to compel compliance with its provisions. It also cannot be squared with this Court's precedents holding both that the preemptive force of Section 3 of the RLA is the same as (or greater than) that of Section 301 of the

Labor-Management Relations Act ("LMRA"), 29 U.S.C. § 185, and that Section 301 of the LMRA has the preemptive force necessary to create federal question jurisdiction. These conflicts present independent reasons for this Court to review the Sixth Circuit's decision. Sup. Ct. R. 10(c).

A. This Court Has Held That Federal Courts Have Federal Question Jurisdiction To Enforce The RLA Obligation To Arbitrate Minor Disputes.

The Sixth Circuit's holding that "there is no indication that Congress intended federal courts to acquire jurisdiction solely to ensure that minor disputes are redirected from the courts to the boards of adjustment," App. 10a, conflicts with this Court's long-standing and consistent determination that "'the District Court has jurisdiction' . . . to enforce compliance with the requirements of [Section 3 of] the Railway Labor Act." *Bhd. of R.R. Trainmen v. Chicago River & Ind. R.R.*, 353 U.S. 30, 42 (1957) (quoting *Bhd. of R.R. Trainmen v. Howard*, 343 U.S. 768, 774 (1952)). For example, after surveying the RLA's legislative history and purpose, the Court in *Chicago River* unanimously recognized that Congress in the RLA intended that federal jurisdiction be available so that "federal courts can compel compliance with the provisions of the Act" regarding resolution of minor disputes by adjustment boards. 353 U.S. at 39. Likewise, in *California v. Taylor*, 353 U.S. 553 (1957), the Court ruled that federal question jurisdiction was available to plaintiff employees after the carrier members of an adjustment board (specifically, the First

Division of the NRAB) refused to arbitrate a minor dispute based on the erroneous belief that they lacked jurisdiction over the CBA at issue. It held that the employees were entitled to a federal court order compelling the arbitration of the minor dispute. *See also Consol. Rail Corp.*, 491 U.S. at 304 (noting federal court jurisdiction to "enjoin strikes arising out of minor disputes"); *cf. Pittsburgh & Lake Erie R.R. v. Ry. Labor Execs. Ass'n*, 491 U.S. 490, 513 (1989) (noting federal court jurisdiction to enjoin a union from striking "when the dispute concerns the interpretation or application of [an RLA-governed] contract and is therefore subject to compulsory arbitration," citing *Chicago River*).

The Sixth Circuit denied the existence of federal question jurisdiction to enforce Section 3 of the RLA based in part on its understanding that the RLA contains no legislative language "creating a federal cause of action for the resolution of [minor] disputes." App. 10a (citing *Geddes*, 321 F.3d at 1354).[13] However, Section 3 of the RLA does provide causes of action for federal district court enforcement and review of adjustment board awards. 45 U.S.C. § 153, First (p) & (q). Moreover, "[t]he absence of a specific statute conferring jurisdiction," as opposed to the general grant of federal question jurisdiction in 28 U.S.C. § 1331, is "of no moment" in RLA cases. *Int'l Ass'n of Machinists v. Central Airlines, Inc.*, 372 U.S. 682, 690

[13] The Eleventh and Third Circuits employed similar reasoning. *See Geddes*, 321 F.3d at 1354 ("the statute includes no language granting general jurisdiction over minor disputes to federal courts"); *P&LE*, 858 F.2d at 942 (relying on "Congress' failure to create in the RLA a civil enforcement action" in federal court).

n.13 (1963) (citations omitted).[14] In *Central Airlines*, an airline employer refused to comply with an RLA arbitration award, and the affected employees brought a federal action to enforce the award. The lower courts found federal jurisdiction wanting because the RLA did not expressly create a federal cause of action to enforce airline (as opposed to railroad) arbitration awards. This Court unanimously reversed, following a long line of prior holdings that found "other duties imposed upon the carriers and their employees by the Railway Labor Act binding and their breach redressable in the federal courts, such as the duty to bargain, and the duty of a certified bargaining representative to represent all members of the craft without discrimination." *Id.* at 690 (citations omitted).

The Sixth Circuit's contrary approach conflicts with this Court's decisions recognizing federal question jurisdiction under 28 U.S.C. § 1331 to enforce Section 3 of the RLA without recourse to specific jurisdictional provisions. This conflict warrants this Court's review.

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[14] *Cf. Grable & Sons Metal Prods., Inc. v. Darue Eng'g & Mfg.*, No. 04-603, slip op. at 9 (June 13, 2005) ("[T]he absence of a federal private right of action [is] evidence relevant to, but not dispositive of, the 'sensitive judgments about congressional intent' that § 1331 requires." (quoting *Merrell Dow Pharms., Inc. v. Thompson*, 478 U.S. 804, 810 (1986))).

B. This Court Has Held That Section 3 Of The RLA Has No Less Preemptive Force Than Section 301 Of The Labor-Management Relations Act, 29 U.S.C. § 185, Under Which State Court Actions Asserting Arbitrable Grievances Are Subject To Federal Question Jurisdiction.

The Sixth Circuit's conclusion "that the RLA does not have the extraordinary preemptive force necessary to create federal removal jurisdiction," App. 12a, also is inconsistent with this Court's decisions. To the contrary, this Court's precedents hold that the preemptive force of Section 3 of the RLA is no less than that of Section 301 of the LMRA, and that Section 301 of the LMRA does have such preemptive force as to provide federal removal jurisdiction.

This Court has already settled the issue of federal removal jurisdiction under the LMRA, ruling that a "claim under [a] collective bargaining agreement [governed by the LMRA] is one arising under the 'laws of the United States.'" *Avco Corp. v. Aero Lodge No. 725, Int'l Ass'n of Machinists*, 390 U.S. 557, 560 (1968) (citation omitted). In *Avco*, this Court upheld the removal to federal court of an employer's state law claim for breach of a "no-strike" clause in a CBA, under which "grievances" were to be settled amicably or by binding arbitration. This Court held that Section 301 completely preempts state law causes of action to enforce such CBAs, replacing them with a federal cause of action to enforce the agreement. *Id.* at 559-61. This Court later elaborated upon *Avco* as follows:

> The necessary ground of decision was that the preemptive force of § 301 is so powerful as to displace entirely any state cause of action "for violation of contracts between an employer and a labor organization." Any such suit is purely a creature of federal law, notwithstanding the fact that state law would provide a cause of action in the absence of § 301. *Avco* stands for the proposition that if a federal cause of action completely preempts a state cause of action any complaint that comes within the scope of the federal cause of action necessarily "arises under" federal law.

Franchise Tax Bd. v. Constr. Laborers Vacation Trust, 463 U.S. 1, 23-24 (1983) (footnote omitted).[15]

This Court's precedents establish that the "preemptive force" of Section 3 of the RLA is no less than that of Section 301 of the LMRA. Both statutes serve the same general goal of averting strikes and other labor disruptions by directing grievance disputes that cannot be resolved amicably to arbitration. *See*,

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[15] This Court has subsequently re-affirmed *Avco's* "'complete pre-emption' approach," *Beneficial Nat'l Bank v. Anderson*, 539 U.S. 1, 7 (2003), and applied it to support federal question jurisdiction over state common-law causes of action asserting improper processing of benefit claims under a plan regulated by the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. §§ 1001, *et seq.*, *Metro. Life Ins. Co. v. Taylor*, 481 U.S. 58 (1987), and over state common-law causes of action for usury against national banks, *Beneficial*.

e.g., *Republic Steel Corp. v. Maddox*, 379 U.S. 650, 652-57 (1965) (LMRA); *Texas & New Orleans R.R. v. Bhd. of Ry. & S.S. Clerks*, 281 U.S. 548, 564-67 (1930) (RLA). If anything, the federal interest underlying the RLA is stronger than that underlying the LMRA, since the LMRA merely enforces voluntary agreements to arbitrate, while the RLA compels such arbitration. *See Andrews v. Louisville & Nashville R.R.*, 406 U.S. 320, 323 (1972). Recognizing the similarities between the two statutes, and in consideration of the "desirability of having a uniform common law of labor law pre-emption," *Hawaiian Airlines*, 512 U.S. at 263 n.9, this Court has "adopt[ed]" the standard for preemption developed under the LMRA "to resolve claims of RLA pre-emption." *Id.* at 263. In keeping with the desirability of uniformity under the LMRA and the RLA, several of the courts of appeals that have upheld federal question jurisdiction over state law claims that constitute minor disputes have explicitly followed *Avco's* "complete preemption" approach. *See, e.g.*, *Gore*, 210 F.3d at 949; *Deford*, 867 F.2d at 1084-86; *Graf*, 790 F.2d at 1345-46. Their reasoning has been reinforced by this Court's recent re-affirmation of *Avco's* "'complete pre-emption' approach" in *Beneficial*, 539 U.S. at 7, where the Court confirmed the soundness of that approach and extended it beyond the LMRA and ERISA to another area of federal law.[16]

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[16] Indeed, one commentator has suggested that *Beneficial* undercuts the Eleventh Circuit's reasoning in *Geddes*, 321 F.3d 1349, for denying federal question jurisdiction under the RLA. *See* Note, *Federal Question Jurisdiction*, 37 Loy. L.A. L. Rev. 1443, 1489 n.250 (2004).

If allowed to stand, the Sixth Circuit's contrary decision will bring about an anomalous result: under *Avco*, federal courts will be available to protect the *voluntary* labor arbitration process under the LMRA, but under *Roddy*, federal courts will not be available to protect the *mandatory* labor arbitration process that Congress required in the RLA. The Sixth Circuit defended this conclusion on the basis that "it would be difficult to find [the] extraordinary preemptive force [required for federal question jurisdiction under the "complete preemption" approach] when the Supreme Court has specifically rejected the contention that the RLA broadly preempts state-law claims based on discharge or discipline." App. 11a. That reasoning, however, ignores *Hawaiian Airlines*' "uniform common law of labor law pre-emption," 512 U.S. at 263 n.9, under which the breadth of Section 3 of the RLA's preemption of such state law claims is precisely the same as that of Section 301 of the LMRA, which, this Court held in *Avco*, has the required preemptive force.

The Sixth Circuit's decision conflicts with this Court's adoption of the "complete preemption" approach in *Avco* and a "uniform common law of labor law of pre-emption" in *Hawaiian Airlines*. This additional conflict also warrants this Court's review.

III. The Sixth Circuit's Decision Is Contrary To Congress's Intent to Make The Federal Courts Available To Enforce The RLA Dispute Resolution Process.

This Court has long recognized that the RLA is a federal "instrument of industry-wide government," which Congress created to preserve the autonomy and

integrity of the railroad industry as a "state within a state." *Taylor*, 353 U.S. at 565-66 (citation omitted); *accord, e.g., Virginian Ry. v. Sys. Fed'n No. 40*, 300 U.S. 515, 541-45, 552-53 (1937). In enacting the RLA, Congress understood that federal protection of the autonomy of that system from state regulation was critically important to its goal: "the Railway Labor Act is 'all-embracing in scope and national in its purpose, which is as capable of being obstructed by state as by individual action.'" *Taylor*, 353 U.S. at 566 (quoting *United States v. California*, 297 U.S. 175, 186 (1936)).

The RLA preserves the autonomy of the federal arbitration system by preempting not only state laws, but also state law actions. As this Court recognized in *Hawaiian Airlines*, 512 U.S. at 253-59, a state law claim may proceed only if it presents a dispute that is not arbitrable because it involves rights that do not involve and are unaffected, or could not be affected, by the terms of a CBA.

The Sixth Circuit's decision curtails the availability of the federal courts to protect the autonomy of the RLA system by denying federal question jurisdiction over state law claims that constitute minor disputes. *See* App. 12a-13a. Under that holding, federal courts no longer are available (absent diversity or supplemental jurisdiction) to delineate the RLA's preemptive scope.

The Sixth Circuit's holding is contrary to Congress's intent. The text, structure, history and context of the RLA indicate that Congress considered it important to support the RLA arbitration system not only with federal law, but also with federal court

enforcement. Congress expressly provided that adjustment board orders are enforceable and reviewable "in the [appropriate] District Court of the United States." 45 U.S.C. § 153, First (p) & (q); *see, e.g., Gunther v. San Diego & Ariz. E. Ry.*, 382 U.S. 257 (1965). Moreover, as discussed above, this Court has consistently interpreted the RLA to create federal question jurisdiction to compel compliance with its arbitration system. *See supra*, Section II.A, and cases cited therein.[17]

By contrast, there is no support in the text of the RLA or in this Court's RLA precedents for the Sixth Circuit's implicit conclusion that Congress intended to create federal question jurisdiction to compel arbitrations, enforce and review arbitration awards, and enjoin strikes that would compromise the integrity of the arbitration system, yet did not intend to create federal question jurisdiction to protect the integrity of that federal system from overlapping state court actions.

The tension between the intent of Congress and the Sixth Circuit's opinion means that this Court's

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[17] The RLA's express and implied grants of federal question jurisdiction to compel and enforce arbitration distinguish it from the "anomal[ous]" jurisdictional scheme of the Federal Arbitration Act, 9 U.S.C. §§ 1-12, which "creates a body of federal substantive law establishing and regulating the duty to honor an agreement to arbitrate, yet it does not create any independent federal-question jurisdiction." *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 26 n.32 (1983). The Sixth Circuit's reasoning might be appropriate under that hybrid scheme, but it ignores the greater preemptive force of the more fully integrated and focused federal system created by the RLA.

review is also necessary to give the issue of federal question jurisdiction over minor disputes a coherent resolution that reflects the means and ends that Congress considered important in enacting the RLA and the proper role of the federal courts in safeguarding the RLA dispute resolution system.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

PAUL A. CUNNINGHAM
Counsel of Record
GERALD P. NORTON
DAVID A. BONO
SIMON A. STEEL
HARKINS CUNNINGHAM LLP
1700 K Street, N.W.
Suite 400
Washington, DC 20006-3817
(202) 973-7600
Attorneys for Petitioners

ROBERT S. HAWKINS
ANDREW J. ROLFES
KLETT, ROONEY,
LIEBER & SCHORLING
Two Logan Square
12th Floor
Philadelphia, PA 19103
(215) 567-7500
Of Counsel

July 13, 2005

APPENDIX A

(any footnotes trail end of each document)
No. 02-2499.

United States Court of Appeals,
Sixth Circuit.

James T. RODDY, Plaintiff-Appellant,

v.

GRAND TRUNK WESTERN RAILROAD INCORPORATED; Tracy Miller; Lawrence T. Wizauer; David Cromie; Peter Brandon; Thomas Willett; Lawrence R. Martenis, Defendants-Appellees.

Argued: April 28, 2004.
Decided and Filed: Jan. 14, 2005.
Rehearing En Banc Denied March 15, 2005.

Douglas A. McKinney, Auburn Hills, Michigan, for Appellant.

Gregory A. Clifton, Durkin, McDonnell, Clifton, Davis & O'Donnell, Detroit, Michigan, for Appellees.

Before: MARTIN and ROGERS, Circuit Judges; BELL, Chief District Judge.*

BELL, Chief District Judge.

Plaintiff-Appellant James T. Roddy ("Roddy") appeals

the district court's denial of his motion to remand and the district court's subsequent grant of summary judgment in favor of the Defendants-Appellees, Grand Trunk Western Railroad, Inc., Tracy Miller, Lawrence T. Wizauer, David Cromie, Peter Brandon, Thomas Willett and Lawrence Martenis (collectively referred to as "Grand Trunk"). For the reasons that follow we reverse the denial of the motion to remand, vacate the entry of summary judgment, and remand to the district court with instructions to enter an order remanding the entire case to state court.

I.

Roddy alleged in his complaint that he began his employment for Grand Trunk in 1965 as a brakeman. In 2000 Roddy was employed by Grand Trunk as a conductor. On July 11, 2000, while driving a motor vehicle on personal business, Roddy was subjected to a routine traffic stop by the City of Durand, Michigan, Police Department. He was arrested and jailed on misdemeanor charges including possession of marijuana. Roddy's wife notified Grand Trunk that Roddy was unavailable for work on the night of July 11, 2000.

Roddy alleged in his complaint that the individual defendants, who are employees and/or agents of Grand Trunk, requested, made or maintained a record of information regarding Roddy's misdemeanor arrest or detention. Based upon those records Grand Trunk conducted a formal company investigation on a charge of possession of marijuana and ultimately terminated Roddy's employment. The misdemeanor charges that had been filed against Roddy on July 11, 2000, were eventually dismissed and no conviction resulted.

Roddy commenced this action in the Circuit Court for the County of Shiawassee, State of Michigan, alleging that Grand Trunk's conduct in requesting, making or maintaining a record of the misdemeanor arrest where a conviction did not result, and their conduct in threatening, coercing, and/or ordering Roddy to release information regarding the misdemeanor arrest or face further disciplinary action violated Roddy's rights under the Michigan Elliott Larsen Civil Rights Act, M.C.L. § 37.2205a.[1] The relief Roddy requested included compensatory damages, exemplary damages, attorney fees and injunctive relief. Defendants removed the action to federal court on the basis of federal question jurisdiction. The district court denied Roddy's motion for remand and granted Defendants' motion for summary judgment. Roddy appealed both of these rulings.

II.

The district court denied Roddy's motion to remand based upon its determination that Roddy's claim under the Michigan Elliott Larsen Civil Rights Act was completely preempted by the Railway Labor Act, 45 U.S.C. § § 151-163, 181-188. We review the denial of a motion to remand *de novo*. *Ahearn v. Charter Twp. of Bloomfield*, 100 F.3d 451, 453 (6th Cir.1996). In conducting this review we look to the complaint at the time of removal and determine whether the action was properly removed in the first place. *Id.*

"Only state-court actions that originally could have been filed in federal court may be removed to federal court by the defendant." *Caterpillar, Inc. v. Williams*, 482 U.S. 386, 392, 107 S.Ct. 2425, 96 L.Ed.2d 318 (1987) (citing 28 U.S.C. § 1441(a)). "As a general rule, absent

diversity jurisdiction, a case will not be removable if the complaint does not affirmatively allege a federal claim." *Beneficial Nat. Bank v. Anderson*, 539 U.S. 1, 6, 123 S.Ct. 2058, 156 L.Ed.2d 1 (2003).

Federal district courts have original jurisdiction over "all civil actions arising under the Constitution, laws, or treaties of the United States." 28 U.S.C. § 1331. In determining whether a complaint arises under federal law we apply the "well-pleaded complaint" rule. *Loftis v. United Parcel Serv., Inc.*, 342 F.3d 509, 514 (6th Cir.2003). Under this rule "we examine the 'well pleaded' allegations of the complaint and ignore potential defenses." *Beneficial Nat. Bank*, 539 U.S. at 6, 123 S.Ct. 2058. "[F]ederal jurisdiction exists only when a federal question is presented on the face of the plaintiff's properly pleaded complaint." *Caterpillar*, 482 U.S. at 392, 107 S.Ct. 2425. The well-pleaded complaint rule recognizes that the plaintiff is the master of his complaint. *Loftis*, 342 F.3d at 515. Accordingly, if the plaintiff chooses to bring a state law claim, that claim cannot generally be "recharacterized" as a federal claim for the purpose of removal. *Id.* (citing *Metro. Life Ins. Co. v. Taylor*, 481 U.S. 58, 63, 107 S.Ct. 1542, 95 L.Ed.2d 55 (1987)). It is settled law that "a case may *not* be removed to federal court on the basis of a federal defense, including the defense of pre-emption, even if the defense is anticipated in the plaintiff's complaint, and even if both parties concede that the federal defense is the only question truly at issue." *Caterpillar*, 482 U.S. at 393, 107 S.Ct. 2425 (emphasis in original). *See also Beneficial Nat. Bank*, 539 U.S. at 6, 123 S.Ct. 2058 ("[A] defense that relies on ... the pre-emptive effect of a federal statute will not provide a basis for removal."); *Metro. Life Ins. Co. v. Taylor*, 481 U.S. 58,

63-64, 107 S.Ct. 1542, 95 L.Ed.2d 55 (1987) ("Federal pre-emption is ordinarily a federal defense to the plaintiff's suit. As a defense, it does not appear on the face of a well-pleaded complaint, and, therefore, does not authorize removal to federal court.").

A state claim may be removed to federal court in only two circumstances--when Congress expressly so provides,[2] or "when a federal statute wholly displaces the state-law cause of action through complete pre-emption." *Beneficial Nat. Bank*, 539 U.S. at 8, 123 S.Ct. 2058. The "complete preemption" doctrine, developed in the case law, recognizes that "Congress may so completely pre-empt a particular area that any civil complaint raising this select group of claims is necessarily federal in character." *Metro. Life*, 481 U.S. at 63-64, 107 S.Ct. 1542. Complete preemption applies where "the pre-emptive force of a statute is so 'extraordinary' that it 'converts an ordinary state common-law complaint into one stating a federal claim for purposes of the well-pleaded complaint rule.' " *Caterpillar*, 482 U.S. at 393, 107 S.Ct. 2425 (quoting *Metro. Life*, 481 U.S. at 65, 107 S.Ct. 1542). "Once an area of state law has been completely pre-empted, any claim purportedly based on that pre-empted state law is considered, from its inception, a federal claim, and therefore arises under federal law." *Caterpillar*, 482 U.S. at 393, 107 S.Ct. 2425.

To date the Supreme Court has recognized complete preemption under only three statutes: § 301 of the Labor Management Relations Act, 1947 (LMRA), 29 U.S.C. § 185, § 502(a) of the Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. § 1001 et seq., and § 30 of the National Bank Act, 12 U.S.C. § §

85 & 86. *Beneficial Nat. Bank*, 539 U.S. at 6-7, 11, 123 S.Ct. 2058. As we noted in *Alongi v. Ford Motor Co.*, 386 F.3d 716 (6th Cir.2004), it is the "unusually powerful pre-emptive force of § 301" that places it in the small category of statutes that not only preempt state law but also authorize removal of actions that sought relief only under state law. *Id.* at 723-24, (quoting *Beneficial Nat. Bank*, 539 U.S. at 7, 123 S.Ct. 2058). In those cases where the Supreme Court has found complete preemption, "the federal statutes at issue provided the exclusive cause of action for the claim asserted and also set forth procedures and remedies governing that cause of action." *Beneficial Nat. Bank*, 539 U.S. at 8, 123 S.Ct. 2058.

Complete preemption that supports removal and ordinary preemption are two distinct concepts. *Warner v. Ford Motor Co.* 46 F.3d 531, 535 (6th Cir.1995) (en banc). "The fact that a defendant might ultimately prove that a plaintiff's claims are pre-empted under [a federal statute] does not establish that they are removable to federal court." *Caterpillar*, 482 U.S. at 398, 107 S.Ct. 2425. Complete preemption that permits removal is reserved for statutes "designed to occupy the regulatory field with respect to a particular subject and to create a superseding cause of action" while ordinary preemption applies to statutory sections that arguably supersede conflicting state laws without creating the right of removal. 46 F.3d at 535. "[T]he congressional intent necessary to confer removal jurisdiction upon the federal district courts through complete preemption is expressed through the creation of a parallel federal cause of action that would 'convert' a state cause of action into the federal action for purposes of the well-pleaded complaint rule." *Strong v.*

Telectronics Pacing Sys., Inc., 78 F.3d 256, 260 (6th Cir.1996) (citing *Warner*, 46 F.3d at 534-35).

In the absence of explicit direction from Congress, the Supreme Court has stated that it would be reluctant to find the extraordinary preemptive power that converts an ordinary state common law complaint into one stating a federal claim for purposes of the well-pleaded complaint rule. *Metro. Life*, 481 U.S. at 64-65, 107 S.Ct. 1542.[3] As we recently noted:

> Complete preemption is a narrow exception to the well-pleaded complaint rule, whereby plaintiff is master of his complaint and can choose to assert only state law claims, in situations where Congress has indicated an intent to occupy the field so completely that any ostensibly state law claim is in fact a federal claim for purposes of arising-under jurisdiction.

AmSouth Bank v. Dale, 386 F.3d 763, 776 (6th Cir.2004). *See also Peters v. Lincoln Elec. Co.*, 285 F.3d 456, 468 n. 11 (6th Cir.2002) ("Without evidence of Congress's intent to transfer jurisdiction to federal courts, there is no basis for invoking federal judicial power.").

> It is true that the doctrine of complete preemption goes beyond the usual contours of the well-pleaded complaint rule, in that it requires courts to attend to the underlying substance of a plaintiff's cause of action, and not merely whether it is denominated as arising from state or federal law. But, as the Supreme Court has instructed us, the complete preemption doctrine does not abrogate the federal courts' traditional focus on the complaint, in deciding questions of removal jurisdiction.

Alongi, 386 F.3d at 727.

The Supreme Court discussed the circumstances under which the RLA will preempt state law claims in *Hawaiian Airlines, Inc. v. Norris*, 512 U.S. 246, 260-64, 114 S.Ct. 2239, 129 L.Ed.2d 203 (1994). This discussion, however, only involved concepts of ordinary preemption and did not address the issue of complete preemption.

Grand Trunk has cited two Sixth Circuit cases in support of its contention that the RLA completely preempts Roddy's state law civil rights claim. In *McCall v. Chesapeake & Ohio R.R.*, 844 F.2d 294 (6th Cir.1988), we held that the plaintiff's state law Handicappers Civil Rights Act claim was preempted by the RLA. *Id.* at 303. *McCall* does not impact our present discussion. The plaintiff's claim in *McCall* was removed to federal court on diversity grounds and our preemption analysis involved ordinary preemption rather than complete preemption.

Grand Trunk has also cited *Beard v. Carrollton R.R.*, 893 F.2d 117 (6th Cir.1989). In *Beard* we noted in passing that the plaintiff's state law claims had not been removed "improvidently and without jurisdiction" to federal court. *Id.* at 121. Although this finding suggests that the RLA completely preempted plaintiff's state law claims, we did not engage in any discussion of the distinction between complete preemption and ordinary preemption and we did not analyze the RLA for Congressional intent. Most of our opinion in *Beard* was dedicated to the issue of ordinary preemption rather than complete preemption. It appears to this Court that to the extent we found complete preemption in *Beard*, that holding has been undermined by subsequent cases addressed above that

have discussed the prerequisites for a finding of complete preemption. *Accord, Tyree v. Burlington Northern and Santa Fe Ry. Co.*, 973 F.Supp. 786, 791 (W.D.Tenn.1997) (concluding that *Beard* is no longer good law).

In determining whether the RLA completely preempts Roddy's state civil rights claim we must begin by looking at the RLA itself. Congress passed the RLA "to promote stability in labor-management relations by providing a comprehensive framework for resolving labor disputes." *Hawaiian Airlines*, 512 U.S. at 252, 114 S.Ct. 2239. The framework provided by the RLA is a mandatory arbitral mechanism for "the prompt and orderly settlement of all disputes growing out of grievances or out of the interpretation or application of agreements covering rates of pay, rules, or working conditions." 45 U.S.C. § 151a. The RLA gives the National Railroad Adjustment Board exclusive jurisdiction over disputes that arise out of collective bargaining agreements. *Beard*, 893 F.2d at 121-22. The existence of a mandatory arbitration provision, however, does not answer the question of whether Congress intended the RLA to occupy the field so completely that any "ostensibly state law claim" touching on railroad employment "is in fact a federal claim" for purposes of removal jurisdiction. *See AmSouth Bank*, 386 F.3d at 776.

The Eleventh Circuit examined the RLA in *Geddes v. Am. Airlines, Inc.*, 321 F.3d 1349 (11th Cir.2003). Based upon the language and substance of the RLA and its legislative history, the Eleventh Circuit concluded that the RLA did not have the extraordinary preemptive force necessary to create federal removal

jurisdiction. *Id.* at 1357. The court noted that in contrast to the LMRA and ERISA, the RLA does not create a federal cause of action for the resolution of disputes. *Id.* at 1354. Accordingly, federal courts are not in a position to fashion a cohesive body of federal law for enforcement of collective bargaining agreements under the RLA. *Id.* Moreover, there is no indication that Congress intended for federal courts to acquire jurisdiction solely to ensure that minor disputes are redirected from the courts to the boards of adjustment. *Id.*

The Third Circuit similarly found "no evidence in the RLA or its legislative history of a Congressional intent to permit recharacterization and removal of what purports to be a state claim." *Ry. Labor Execs. Ass'n v. Pittsburgh & Lake Erie R.R. Co.*, 858 F.2d 936, 942 (3d Cir.1988). The Ninth Circuit has also rejected a finding that a plaintiff's state law claims were completely preempted by the RLA. *Price v. PSA Inc.*, 829 F.2d 871, 876 (9th Cir.1987). "Congress has not indicated, as it did with LMRA § 301 and ERISA, that the RLA is 'so powerful as to displace entirely any state cause of action.' " *Id.* (quoting *Metro. Life*, 481 U.S. at 64, 107 S.Ct. 1542).[4] *See also Tyree*, 973 F.Supp. at 792 (holding that removal was improper because "it is clear that the RLA does not satisfy the complete preemption doctrine because it does not create a parallel federal cause of action.").

Not all of the circuits are in agreement. The Eighth Circuit has held that "the RLA's preemptive force is so extraordinary that it takes over the whole field of railroad labor disputes arising from collective bargaining agreements." *Deford v. Soo Line R.R. Co.*,

867 F.2d 1080, 1085 (8th Cir.1989). More recently the Eighth Circuit held in *Gore v. Trans World Airlines*, 210 F.3d 944, 949 (8th Cir.2000), that the plaintiff's state law claims of false arrest, negligence, libel and slander, and invasion of privacy were completely preempted by the RLA and were removable to federal court because they were inextricably intertwined with the provisions of the labor contract. *Id.* at 950. *See also Anderson v. American Airlines, Inc.*, 2 F.3d 590 (5th Cir.1993) (holding that employee's workers compensation retaliation claim was not completely preempted by RLA because claim did not require interpretation of the CBA).

On review we conclude that the Eleventh Circuit's analysis of the RLA in *Geddes*, 321 F.3d at 1353-57, is most consonant with the Supreme Court's instructions on how to approach issues of complete preemption. Complete preemption represents a substantial departure from the firmly established well-pleaded complaint rule. This Court is hesitant to find such a departure absent clear Congressional intent to that effect. We agree with the Eleventh Circuit that Congress has not clearly manifested an intent to make all causes of action that touch on railroad employment removable to federal court.

Indeed, it would be difficult to find such extraordinary preemptive force when the Supreme Court has specifically rejected the contention that the RLA broadly preempts state-law claims based on discharge or discipline:

> In *Andrews v. Louisville & Nashville R. Co.*, 406 U.S. 320, 92 S.Ct. 1562, 32 L.Ed.2d 95 (1972), the Court held that a state-law claim of wrongful termination

> was pre-empted, *not* because the RLA broadly pre-empts state-law claims based on discharge or discipline, but because the employee's claim was firmly rooted in a breach of the CBA itself.

Hawaiian Airlines, 512 U.S. at 257, 114 S.Ct. 2239 (emphasis in original). We conclude that the RLA does not have the extraordinary preemptive force necessary to create federal removal jurisdiction.

Grand Trunk has suggested in the alternative that the district court's finding of complete preemption finds support in the Railroad Administration Regulations at 49 C.F.R. § 219.1 *et seq.* In *AmSouth* we rejected the contention that a federal regulation could completely preempt state law claims. We noted that although an agency has the ability to promulgate regulations with the force of federal law and therefore has the ability to preempt state causes of action through ordinary preemption, it does not have the ability to create a right of action where Congress has not intended it do so. 386 F.3d at 776-77. "While the agency can create federal law, it cannot expand federal jurisdiction." *Id.* at 777.

We conclude that there was no removal jurisdiction in this case and that the case should be remanded to state court. Because there is no removal jurisdiction, we do not have jurisdiction to reach the question of whether Roddy's state claim is in fact preempted by federal law. We agree with the Third and Eleventh Circuits that "[s]tate courts are competent to determine whether state law has been preempted by federal law and they must be permitted to perform that function in cases brought before them, absent a Congressional intent to the contrary." *Geddes*, 321 F.3d at 1357 (quoting *Ry. Labor Execs. Ass'n*, 858 F.2d at 942). *See also Price*,

829 F.2d at 876 ("We express no opinion on the merits of PSA's federal preemption defense. We have confidence in the ability and willingness of state courts to enforce federal defenses.").

III.

For the foregoing reasons, the denial of plaintiff's motion to remand is **REVERSED**, the entry of summary judgment is **VACATED**, and the case is **REMANDED** with instructions to **REMAND** the entire action to the Shiawassee County Circuit Court for the State of Michigan for further proceedings.

Footnotes

* The Honorable Robert Holmes Bell, Chief United States District Judge for the Western District of Michigan, sitting by designation.

1.This statute provides in pertinent part:
An employer, employment agency, or labor organization, other than a law enforcement agency of this state or a political subdivision of this state, shall not in connection with an application for employment or membership, or in connection with the terms, conditions, or privileges of employment or membership request, make, or maintain a record of information regarding a misdemeanor arrest, detention, or disposition where a conviction did not result.
M.C.L. § 37.2205a.

2.As an example, the Supreme Court noted that the Price-Anderson Act contains an unusual preemption provision, 42 U.S.C. § 2014(hh), that not only gives federal courts jurisdiction over tort actions arising out

of nuclear accidents but also expressly provides for removal of such actions brought in state court even when they assert only state-law claims. *Beneficial Nat. Bank*, 539 U.S. at 6, 123 S.Ct. 2058 (citing *El Paso Natural Gas Co. v. Neztsosie*, 526 U.S. 473, 484-85, 119 S.Ct. 1430, 143 L.Ed.2d 635 (1999)).

3.This reluctance was emphasized by Justice Brennan in his concurring opinion:

While I join the Court's opinion, I note that our decision should not be interpreted as adopting a broad rule that any defense premised on congressional intent to pre-empt state law is sufficient to establish removal jurisdiction. The Court holds only that removal jurisdiction exists when, as here, "Congress has *clearly* manifested an intent to make causes of action ... *removable to federal court.*" *Ibid.* (emphasis added). In future cases involving other statutes, the prudent course for a federal court that does not find a clear congressional intent to create removal jurisdiction will be to remand the case to state court.
Metro. Life, 481 U.S. at 67-68, 107 S.Ct. 1542 (Brennan, J., concurring).

4.The Ninth Circuit has identified an apparent conflict within the circuit as to whether or not the RLA has complete preemptive power. *See Holman v. Laulo-Rowe Agency*, 994 F.2d 666, 669 n. 4 (9th Cir.1993) (comparing *Price v. PSA Inc.*, 829 F.2d 871 (9th Cir.1987) with *Grote v. Trans World Airlines, Inc.*, 905 F.2d 1307 (9th Cir.1990) (citing *Price* with approval on a related issue, but then holding, without discussion, that the RLA does have complete preemptive power)).

APPENDIX B

No. 02-72976
UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

James T. Roddy, Plaintiff

v.

Grand Trunk Western Railroad, Inc., et al.,
Defendant(s)

ORDER DENYING PLAINTIFF'S MOTION TO REMAND

This matter came before the Court on Plaintiff's motion to remand. Being fully advised in the premises, having read the pleadings, and for the reasons stated on the record, the Court hereby orders as follows:
Plaintiff's motion to remand is denied.

s/Nancy G. Edmunds
U.S. District Judge

Dated: 04 OCT 2002

APPENDIX C

No. 02-72976
UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

James T. Roddy, Plaintiff

v.

Grand Trunk Western Railroad, Inc., et al., Defendants

MOTION TO REMAND
BEFORE THE HONORABLE
NANCY G. EDMUNDS
United States District Judge
226 Theodore Levin U.S. Courthouse
231 Lafayette Boulevard West
Detroit, Michigan
September 25, 2002

APPEARANCES:

MR. DOUGLAS A. MCKINNEY, ESQ.,

In behalf of Plaintiff.

MR. GREGORY A. CLIFTON, ESQ.,

In behalf of Defendant.

LAW CLERK: Court calls 02-72576, Roddy versus Grand Trunk Western Railroad. Counsel, please state your appearances for the record.

MR. MCKINNEY: Douglas McKinney on behalf of the plaintiff, James Roddy.

MR. CLIFTON: Good afternoon, Your Honor, Greg Clifton and Jerry McDonnell on behalf of defendant Grand Trunk.

THE COURT: It's plaintiff's motion to remand.

MR. MCKINNEY: Thank you, Your Honor. This matter was initially commenced in the Shiawasee Circuit Court in the State of Michigan. Matter was removed by a joint removal filed by the defendant. This motion to remand is based on the fact that my original complaint states no federal question and does not require the constitution of the United States statute, statute of the United States or a treaty of the United States to render jurisdiction. In this particular case, my claim rests entirely on the Elliott Larson Michigan Civil Rights Act and --

THE COURT: Well, it doesn't really depend on what you call it, though, does it? I mean, it depends on what underlying facts and law need to be resolved in order to effectuate the relief that you seek.

MR. MCKINNEY: Well, Your Honor, I have sat in my office and thought about this issue and whether or not this court had original jurisdiction of the case; in other words, could I have drafted any complaint in such a way as to grant subject matter jurisdiction in this court over

my complaint, and I have come up with no statute, no court rule that would allow me to bring this type of action in the federal court.

THE COURT: That's not dispositive either because I think that the response to that, anticipating Mr. Clifton and Mr. McConnell, is you may not have a cause of action right now because of the administrative regulatory scheme of the railroad act, National Railroad Act. I mean, I'm assuming that what will follow, if I keep this, is a motion to dismiss because it shouldn't be here in federal court. In fact, your client was proceeding through the grievance process under the RLA at the time that you decided to file this lawsuit.

MR. MCKINNEY: Well, Your Honor, I've discovered unlawful conduct prescribed by Michigan statute engaged in by the employer in this case, acts that are specifically prescribed by the Michigan statute. The Michigan statute does not -- my relief does not rely upon the collective bargaining agreement. The question is is there unlawful conduct engaged in by the employer.

THE COURT: What's the unlawful conduct?

MR. MCKINNEY: They requested, made, and maintained records of a misdemeanor arrest of the --- of my client that did not result in a conviction. Those are specifically outlined in the statute as being something the employer cannot do. Does not depend, the actions of the employer do not depend upon the collective bargaining agreement. Did they engage in this conduct? Did this conduct damage the plaintiff in this case? As such, it exists independent of the collective bargaining

agreement and is governed entirely by state law, conferring no jurisdiction over my case in this court. This is really a defense to a state law claim brought in the state court, not here.

THE COURT: Well, you're mixing black letter remand removal law with these preemption issues, and generally speaking, you're correct. If it's a defense based in federal law and the complaint is based exclusively in state law, the plaintiff has the right to put their complaint where they want to put it. But there are certain areas in which there is complete preemption, and certain aspects of the Federal Railway Labor Act are included in those, and there's that whole body of law about minor disputes and how to resolve minor disputes and all of those issues. So whether it's asserted as a defense and that would ordinarily be dispositive I don't think is really the issue in this case.

MR. MCKINNEY : Well, I'm not sure what the Court is trying to determine from my complaint, but I think if you look at Hawaiian Airlines versus Norris, it clearly indicates that if the state law claim exists independent of the collective bargaining agreement that it is not preempted.

THE COURT: Well, isn't the underlying question, you know, whether his discipline was appropriate or not, whether he violated the terms of the operating rules, and whether they had the right to impose discipline as a matter of the collective bargaining agreement under the operating rules? Maybe I got that reversed. But I mean, isn't this really a dispute involving a --- a minor dispute involving rights of pay, rules and working conditions?

MR. MCKINNEY: No, it involves unlawful conduct engaged in by the employer for which I'm entitled to a state remedy. They could be, in my view they could be completely consistent with the collective bargaining agreement yet violate state law, and state law gives me an alternate, not an alternate, an additional remedy over and above what other remedies he may have as set forth in the statute. The State of Michigan has decided that it's against public policy to allow employers to request, make or maintain arrest records for misdemeanors that do not result in a conviction. They engaged in that conduct. Whether or not they had any authority under the rules to do so, I suppose is another issue. However, this is direct, unlawful conduct prescribed by the State of Michigan which they have engaged in. Michigan law allows me other relief, specifically injunctive relief prohibiting the employer from continuing to engage in conduct that violates the Act, which I have requested in the complaint. I want injunctive relief, as well.

So there's no way to get injunctive relief under the Railway Labor Act to prohibit their unlawful conduct. This is precisely the reason the legislature enacted, Michigan enacted this law, to give additional remedies and describe unlawful conduct. I don't see anything in the Railway Labor Act or the rules and regulations which say that a carrier and a union can somehow agree to violate state law. It seems to me such a contract would be void as against public policy, and in this particular instance, if we look directly at my case and I believe based on their filings here, they basically admitted that they violated in part the act; I would be entitled to summary disposition, as well, because they violated the act.

There is another claim of improper action by the employer, specifically, making him or requiring him to, or forcing him not to exercise the rights guaranteed to him under the Michigan Elliott Larson Civil Rights Act. Specifically, not to have to make mention of his misdemeanor arrest while it's pending, and didn't result in a conviction. This is what happened. After the initial discipline was imposed, he was required to go to a treatment program which he appeared at, but in order to enter the program, they required him to admit wrongdoing, admit that he violated the law, and then sign a release allowing that information to be disseminated presumably to the prosecutor who is presenting the case. This is the purpose of the statute, not to allow them to coerce him to give up rights that he otherwise would have in the criminal action.

And I will state that the underlying charges were dismissed with prejudice in the case. There was never a conviction for either the possession of the drugs or for resisting, obstructing a police officer. In short, what they've done is, they've used the police report that they're not supposed to have access to then put him in disciplinary action, and then force, try to force him to, quote unquote, confess, and that's what the statute is trying to avoid. It's trying to avoid putting an employee in such a position where the employer can hold over his head his continued employment unless he confesses, which is precisely what they're trying to avoid by enacting the statute.

THE COURT: All right. Let me hear from Mr. Clifton.

MR. CLIFTON: Good afternoon, Your Honor.

I think, with due respect to Mr. McKinney, he is missing the point that the court was trying to make which is, assuming for the moment that there is some basis for a Elliott Larson claim in this case, which we deny based on the circumstances, but even if, assuming it was, the point of the matter is the Railroad Labor Act supersedes any such potential claim and mandates that under this type of circumstance, a plaintiff's sole remedy is to proceed through the exclusive procedures of the-- of that act and the National Adjustment Board.

And particularly given the facts in this case where you have an individual who was arrested on July 11, 2000 for possession of marijuana, whose violent behavior at the time of that arrest resulted in him also being charged with resisting arrest, and whose willingness to lie to his employer about the circumstances of it because he was scheduled to work that night, certainly, all of those types of issues, those facts, concern Mr. Roddy's physical ability to do his job, the physical requirements of his job, and because of that, Grand Trunk was certainly entitled under the collective bargaining agreement between Mr. Roddy and his union to commence a labor hearing to look into these facts as to how they affect Mr. Roddy's ability to perform his work. Then, as part of that, assess his violation of very specific work rules, as pointed out by the Court, that says you can't do this type of thing.

THE COURT: Well, but how do you square that with the very explicit prohibition in the civil rights act? I mean, it seems to me that this is somewhat different from the usual preemption case that we get in that the allegation is, okay, he's arrested, charged with a misdemeanor which ultimately is dismissed.

MR. CLIFTON: As part of a plea agreement, I might add.

THE COURT: Well, regardless, it doesn't matter whether it's part of a plea agreement or anything else. There's no conviction in this case.

MR. CLIFTON: That's well understood, Your Honor.

THE COURT: And Grand Trunk is taking that conviction -- I mean that arrest and using it to impact his employment in what looks to me to be a square contradiction of MCL 37.2205(a) which says an employer shall not, in connection with an application, et cetera, or in connection with the terms, conditions or privileges of employment request, make or maintain a record of information regarding a misdemeanor arrest, detention or disposition where a conviction did not result.

So how -- I mean, the statute is, seems to me, pretty clear, and I'm --

MR. CLIFTON: May I address that, Your Honor?

THE COURT: You may.

MR. CLIFTON: First of all, I guess it's not for today, but it's worth mentioning, I suppose, that the Michigan Court of Appeals has ruled, and the Sixth Circuit has adopted that ruling that this particular civil rights act and the provision regarding arrest records only applies to prospective employers, not current employers such as Grand Trunk, but that aside for the moment, I guess the central issue here is why was Mr. Roddy disciplined

on July 26 following his arrest on July 11? It was not because there was an arrest record, because as the, I think it's the Quatrine(ph) case pointed out, it would be folly to suggest that Grand Trunk could go to the police station and get this information and come back and then conduct a disciplinary hearing, and that would be permissible, but the mere fact that they obtained a copy of the arrest record, that somehow makes it inappropriate.

The reason he was disciplined initially was not because of the existence of an arrest record. The reason he was disciplined was because, as I indicated, he had in his possession marijuana when he was scheduled to work that night on a train crew that could be taking trains from point A to point B and cause catastrophic damages.

THE COURT: And how do you know that?

MR. CLIFTON: Because he was scheduled to work -- one of the charges against him was when he was scheduled to work that night, he had his wife call in and falsify a report regarding why he couldn't come into work that night.

THE COURT: So how does it come up that he had marijuana in his possession?

MR. CLIFTON: Well, again, when it came to the railroad's attention that this individual was perhaps not being forthright in why he did not come to work that particular evening.

THE COURT: And how did that come to its attention?

MR. CLIFTON: Well, I think a co-employee of Mr. Roddy, frankly, advised somebody in supervision that I think you should look into this, you might find out that he's not telling the truth, and then they conducted an investigation which, by the way, and I haven't had a chance to get to it yet, as a separate basis for exclusively RLA jurisdiction, the railroad was essentially mandated by provisions of 49 CFR 219 to conduct this exact type of investigation. Those provisions set forth some rather strict and severe procedures for what a railroad is supposed to do when they learn that an employee may be involved in some type of drug or alcohol use, and that's all that the railroad did here was conduct an investigation, and when they concluded that, yes, this individual did violate these work rules as a result of his conduct, he was disciplined for that.

His arrest record had nothing to do with it, frankly, and if you look at the transcript of the hearing, it was rather incidental to the entire proceeding.

THE COURT: All right. Let me have a brief reply from plaintiff's counsel.

MR. MCKINNEY: I didn't see a citation of the statute he just indicated or the CFR that he just talked about, however, I don't see how you could read the transcript of that proceeding and not come to the conclusion that based entirely upon the unlawfully obtained arrest record he was disciplined. Based on that record alone, they made a finding that he was in possession of marijuana and disciplined him as a result of that. There was no other evidence on that record that he possessed an illegal substance. So for them to now say, well, it was

incidental, it wasn't incidental. It was the major reason they ordered him to go to drug rehabilitation. There was no admissions made on the record as to that issue.

Now, I don't see how, unless there's an express intent of congress to preempt, have the Railway Labor Act preempt state civil rights statute like this that they can infer that it exists. In other words, what they're trying to say here is that because of the Railway Labor Act and because of a contract, we can disregard state law, and Hawaiian Airlines says that's not the case, and in fact it's not preempted if it involves an independent state right not negotiated in the contract.

THE COURT: All right. Thank you.

I'm going to deny the motion to remand. I think Mr. McKinney actually kind of hit it on the head right at the end. I don't believe that the state civil rights claim is independent of the Railway Labor Act. In fact, the issues involved in the minor dispute here are areas exclusively reserved to the administrative scheme of the Railway Labor Act, including the character fitness and safety of the personnel to operate the equipment involved, and to the extent that there is a conflicting civil rights statute, and I'm not foreclosing the possibility of some relief under the civil rights statute, it still has to be reconciled with the administration of the Railway Labor Act.

Obviously, the safety, character and fitness of the employees to operate the trains is a matter which needs to be to be fully considered within the administrative scheme, taking into account any laws that may be impacted. So motion to remand denied.

MR. MCKINNEY: Are you suggesting that I can get injunctive relief from this court on my cause of action?

THE COURT: I'm not suggesting that you can or can't get anything. I'm just ruling on your motion to remand. Thank you.

MR. MCKINNEY: Is the court going to prepare an order, or should I?

THE COURT: My order will simply state for the reasons stated on the record, but we'll prepare it.

MR. CLIFTON: Thank you, Your Honor.

APPENDIX D

No. 02-72976
UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

James T. Roddy, Plaintiff

v.

Grand Trunk Western Railroad, Inc., et al., Defendants

MEMORANDUM OPINION AND ORDER GRANTING DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

Honorable Nancy G. Edmunds
Clerk's Office U.S. District Court Eastern Michigan

Filed: 11/21/2002

This matter comes before the Court on Defendants' motion for summary judgment brought pursuant to Fed. R. Civ. P. 12(c) and 56(c). Defendants' motion is GRANTED. For the reasons stated below, this Court lacks subject matter jurisdiction over Plaintiff James T. Roddy's state law claims. Plaintiff's complaint is dismissed.

I. Facts

Plaintiff began his employment with Defendant Grand Trunk in 1965 as a brakeman. In July 2002, Plaintiff was employed at Grand Trunk as a conductor. (Compl. Pars.

11, 20.) He was a member of the United Transportation Union, and the terms of his employment were subject to a collective bargaining agreement ("CBA"). (Defs. motion, Ex. B, Kovacs Aff. Par. 5.)

The events giving rise to Plaintiff's lawsuit occurred on July 11, 2000. At approximately 8:05 p.m. while Plaintiff was off-duty, he was arrested by the City of Durand Police Department for, *inter alia*, possession of marijuana and resisting arrest (both misdemeanors). Plaintiff alleges that during his arrest, he was exposed to chemical irritants (pepper spray) and jailed. (Compl. Par. 14.) Plaintiff was scheduled to report for duty at 10:45 p.m. (Defs. motion, Ex. C, 7/26/00 Hr'g Tr. at 6.) Plaintiff's wife called Defendant Grand Truck at approximately 9:40 p.m. indicating that he was sick and would not be reporting for his scheduled work. (*Id.*; Compl. Par. 15.) Plaintiff was released on bond at approximately 4:30 p.m. on July 12, 2000. (Defs. motion, Ex. C, 7/26/00 Hr'g Tr. at 22.) Plaintiff alleges that the charges arising out of the events of July 11, 2000 were dismissed and no conviction resulted. (Compl. Par. 25.)

Representatives of Defendant Grand Trunk learned about the above events and an investigation by Grand Trunk Manager David Cromie confirmed Plaintiff's possession of marijuana and other unlabeled drugs as well as his resisting arrest charge. Defendant Grand Trunk obtained a copy of the Durand Police Report regarding the July 11, 2000 incident and a State of Michigan Drug Test Report. (Defs. motion, Ex. A.) Based on this information, Grand Trunk held an investigative hearing on July 26, 2000 to determine Plaintiff's responsibility for: (1) "alleged conduct unbecoming an employee by being arrested for

possession of a controlled substance at approximately 2100 hours on July 11, 2000, in violation of GTOR E, paragraph 2"; and (2) "allegedly having [Mrs. Roddy] book [Plaintiff] sick as a subterfuge to avoid duty at 2140 hours on July 11, 2000." (Defs. motion, Ex. C, at 1.) Grand Trunk Operating Rule E provides that:

> Employees must be courteous, orderly, of good moral character, and must conduct themselves at all times whether on or off of company property in such a manner as not to bring discredit upon the company. Card playing, gambling, making bets, fighting or participating in any illegal, immoral, or unauthorized activity while on company time is prohibited.

Defs. Br. at 4-5 (emphasis added). The July 26, 2000 hearing was conducted in accordance with the provisions of the CBA between Grand Trunk and the United Transportation Union (Plaintiff's Union). (Defs. motion, Ex. B, Kovacs Aff. Par. 16, Senior Manager of Labor Relations for Grand Trunk.). Plaintiff was represented at the hearing by his Union.

On August 4, 2000, consistent with the CBA, Plaintiff was assessed the following discipline:

> Sixty (60) Day Suspension
>
> For conduct unbecoming an employee by being arrested for possession of a controlled substance at approximately 2100 hours on July 11, 2000, in violation of GTOR E, paragraph 2 and having your wife book you sick as a subterfuge to avoid duty at 2140 hours on July 11, 2000.

> In addition, you must undergo an EAP evaluation and fully comply with any recommendation developed from the evaluation. You must get a release from the EAP counselor and undergo a company medical examination before you will be allowed to return to service.

Defs. motion, Ex. D, 8/25/00 letter to Plaintiff. Plaintiff was scheduled to attend an Employee Assistance Program (EAP) evaluation with Insight Clinic on September 8, 2000.

Plaintiff failed to provide evidence that he had completed the EAP evaluation/counseling and other requirements of his discipline. Accordingly, a second investigative hearing was held, pursuant to the CBA, on November 6, 2000 to determine Plaintiff's responsibility "for violation of Canadian National Illinois Central Operating Rule 'B'" which provides that employees are to comply with instructions from supervisors. (Defs. motion, Ex. E, 11/6/00 Hr'g Tr. at 1; Ex. F, 1/19/01 letter to Union at 1-2.) Plaintiff was also represented at this hearing by his Union. Plaintiff was found guilty of violating Operating Rule "B", and on November 25, 2000, he was dismissed from employment with Defendant Grand Trunk. (Defs. motion, Ex. F, 1/19/01 letter at 2.)

The Union, on Plaintiff's behalf, filed a first level appeal of his dismissal. This proved unsuccessful. (Defs. motion, Ex. F, 1/19/01 letter at 2-3.) Consistent with the CBA, Plaintiff is entitled to further pursue his dismissal through an appeal to the carrier's senior manager of labor relations. He also has the right to ultimately appeal his dismissal to binding arbitration before a

panel of the National Railroad Adjustment Board in accordance with provisions of the Railway Labor Act, 45 U.S. C. §§ 151, *et seq*. Plaintiff asserts that he is following this procedure. (Pl.'s Resp. at 10.)

In addition to pursuing internal appeal procedures for his discipline and discharge, Plaintiff also filed a civil action in the Circuit Court for the County of Shiawassee in June of 2002. Plaintiff's complaint alleges that Defendants wrongfully terminated him in violation of his rights, pursuant to Michigan's Elliott-Larsen Civil Rights Act, Mich. Comp. Laws Annot. § 37.2205a, not to be discriminated against for an off-duty misdemeanor drug arrest that did not result in a conviction. Plaintiff seeks both legal and equitable remedies; i.e., compensatory and exemplary damages, an order enjoining Defendants from discriminating or retaliating against him, requiring Defendants to remove and destroy all documents mentioning the disciplinary action described above, and requiring Defendants to reinstate Plaintiff to the position he would have held absent the alleged discrimination, (Compl. at 7.)

Defendants removed this action in July 2002, and this Court denied Plaintiff's motion to remand on October 4, 2002.

II. Standard of Review

A. Judgment on the Pleadings

At any time after the pleadings close, but before trial commences, a party may move for a judgment on the pleadings. *See* Fed. R. Civ. P. 12(c). The standard of

review is the same as on a motion to dismiss pursuant to Fed. R. Civ. P. 12(b)(6).

As with a 12(b)(6) motion, in a light most favorable to Plaintiff, the court must assume that Plaintiff's factual allegations are true and determine whether the Complaint states a valid claim for relief. *See Albright v. Oliver*, 510 U.S. 266 (1994); *Bower v. Federal Express Corp.*, 96 F.3d 200, 203 (6th Cir. 1996); *Forest v. United States Postal Serv.*, 97 F.3d 137, 139 (6th Cir. 1996).

This standard of review "'requires more than the bare assertion of legal conclusions.'" *In re Sofamor Danek Group, Inc.*, 123 F.3d 394, 400 (6th Cir. 1997) (quoting *Columbia Natural Resources, Inc. v. Tatum*, 58 F.3d 1101, 1109 (6th Cir. 1995)). The Complaint must include direct or indirect allegations "respecting all the material elements to sustain a recovery under some viable legal theory." *See In re Delorean Motor Co.*, 991 F.2d 1236, 1240 (6th Cir. 1993) (citations omitted). A court should not grant such a motion unless the movant shows "beyond doubt that the plaintiff can prove no set of facts in support of his claim," *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957).

B. Standard for Summary Judgment

Summary judgment is appropriate only when there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. *See* Fed. R. Civ. P. 56(c). The central inquiry is "whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 251-52

(1986). After adequate time for discovery and upon motion, Rule 56(c) mandates summary judgment against a party who fails to establish the existence of an element essential to that party's case and on which that party bears the burden of proof at trial. *See Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986).

III. Analysis

The essence of Plaintiff's complaint is that he was wrongfully discharged because Michigan law precludes his employer from disciplining him based on an off-duty misdemeanor drug arrest that did not result in a conviction. *See* Mich. Comp. Laws § 37.2205a (West 2001).[1] Defendants bring this motion asserting that this action should be dismissed because Plaintiff's state-law claims are preempted by the Railway Labor Act ("RLA"), 45 U.S.C. § 151, *et seq.*, and this Court lacks subject matter jurisdiction over them.

"Whether federal law pre-empts a state law establishing a cause of action is a question of congressional intent." *Hawaiian Airlines, Inc. v. Norris*, 512 U.S. 248, 252 (1994). Congress passed the RLA to promote stability in labor-management relations for the railway industry "by providing a comprehensive framework for resolving labor disputes." *Id.* (citing 45 U.S.C. § 151a). Defendants' preemption argument is premised on the assertion that Plaintiff's state-law claims are "minor disputes" within the meaning of the RLA and are therefore subject to arbitration under the RLA's exclusive jurisdiction provisions. "Under the RLA, parties are obligated to arbitrate minor disputes, which are controversies arising out of the application or interpretation of the

collective bargaining agreement, and therefore, complete preemption applies to disputes involving duties and rights created or defined by the collective bargaining agreement." *Gore v. Trans World Airlines*, 210 F.3d 944, 949 (8th Cir. 2000), *cert denied*, 532 U.S. 921 (2001).

The RLA defines "minor disputes" as those that "gro[w] out of grievances or out of the interpretation or application of agreements covering rates of pay, rules, or working conditions." 45 U.S.C. § 151a. Preemption under the RLA is governed by the same standard as that applied under § 301 of the Labor and Management Relations Act, 29 U.S.C. § 185. *See id.* "[U]nder this standard 'a state-law cause of action is not pre-empted by the RLA if it involves rights and obligations that exist independent of the [collective bargaining agreement].'" *Id.* (quoting *Hawaiian Airlines*, 512 U.S. at 260). Stated otherwise, as long as the state-law claim can be resolved without interpreting the parties' rights and obligations under the CBA, then the claim is independent for preemption purposes. *See Hawaiian Airlines*, 512 U.S. at 262, As observed by the Supreme Court, "collective bargaining agreements may include implied, as well as express, terms" and that "the parties' 'practice, usage and custom' is of significance in interpreting their agreement." *Consolidated Rail Corp. v. Railway Labor Executives' Assn*, 491 U.S. 299, 311 (1989). *See also Hawaiian Airlines*, 512 U.S. at 265 n.10 (citing *Consolidated Rail*, 491 U.S. at 311-12; *United Steelworkers of Am. v. Warrior & Gulf Nav. Co.*, 363 U.S. 574, 578-79 (1960)). "The collective agreement covers the whole employment relationship." *Consolidated Rail*, 419 U.S. at 312 (internal quotes and citations omitted).

It is not disputed here that Defendant Grand Trunk has implemented the Federal Railroad Administration regulations governing alcohol and drug use by railroad employees. *See* 49 C.F.R. § 219.1, et seq. "Pursuant to congressional authorization and in response to evidence implicating substance abuse in railroad accidents, the Federal Railroad Administration in 1985 promulgated a comprehensive set of detailed regulations concerning the use of alcohol and drugs by railroad employees." *Union Pacific Railroad Co. v. United Transportation Union*, 3 F.3d 255, 261 (8th Cir. 1993) (citing 50 Fed. Reg. 31508 (1985) (codified as amended at 49 C.F.R. Part 219)). These federal regulations set forth the parties' rights and obligations when addressing issues concerning a railroad employee's alcohol or drug use. Their general purpose is "to prevent accidents and casualties in railroad operations that result from impairment of employees by alcohol or drugs" and to prescribe "minimum Federal safety standards for control of alcohol and drug use" while not "restrict[ing] a railroad from adopting and enforcing additional or more stringent requirements not inconsistent" with these regulations. 49 C.F.R. § 219.1.

Defendants assert that Plaintiff's state-law claims would require interpretation of the parties' rights and obligations under their CBA; i.e., Operating Rule E and these federal regulations promulgated by the Federal Railroad Administration. *See* 49 C.F.R. §§ 219.1, 219.13, 219.101, and 219.102. Defendants argue that Operating Rule E and 49 C.F.R. § 219.102 govern off-duty drug use and that Plaintiff's state-law claims directly conflict with the duties imposed on them under 49 C.F.R. § 219.105. Accordingly, they argue, Plaintiff's state-law claims are preempted as "minor disputes" by the "RLA",

45 U.S.C. § 151a, are subject to its exclusive adjudicative procedures, and thus Plaintiff's claims must be dismissed as this Court lacks subject matter jurisdiction over them. This Court agrees with Defendants.

Plaintiff's state-law claims are inextricably intertwined with interpretation of rights and obligations that exist under the parties' CBA; i.e., whether Defendant Grand Trunk has the right to request, make, or maintain a record of information regarding an off-duty misdemeanor drug arrest that did not result in a conviction and whether Plaintiff has a right to impede access to this information or to refuse to answer questions regarding such an arrest. Defendants assert that Operating Rule E allows it to investigate whether Plaintiff conducted himself in a manner that does not discredit the company even when he is off-duty. They further assert that 49 C.F.R. § 219.102 prohibits railroad employees from using controlled substances like marijuana "at any time, whether on duty or off duty" and that 49 C.F.R. § 219.105 imposes a duty on a railroad employer to "exercise due diligence to assure compliance with . . . § 219.102 by each covered employee" and Plaintiff is a covered employee. Plaintiff disagrees.

Plaintiff's argument, that his state-law claims brought pursuant to Michigan's Elliott- Larsen Civil Rights Act, § 37.2205a involve rights and obligations that exist independent of the parties' CBA, is overly simplistic. Plaintiff fails to address, as he must, whether his state-law claims can be resolved independently of the CBA, Operating Rule E, and the above-referenced federal regulations. They cannot. In fact, Plaintiff's state-law

claims are in direct conflict with Defendants' responsibilities under these federal regulations. Pursuant to § 219.105, Defendants have a duty to investigate and assure compliance with § 219.102's prohibition against off-duty use of a controlled substance. This is a broad requirement that does not distinguish between misdemeanor drug violations and felonies or between arrests leading to convictions and those that do not. A railroad employer cannot comply with these federal regulations and Mich. Comp. Laws § 37.2205a when the off-duty drug activity involves a misdemeanor arrest, detention, or disposition not resulting in a conviction.

Plaintiff's state-law claims, that he was wrongfully disciplined and discharged based on consideration of his off-duty misdemeanor drug arrest, cannot be understood without reference to the CBA, Operating Rule E, and the above-referenced federal regulations. To prove his claim, Plaintiff must prove that Defendants did not have the right, under the express or implied terms of the CBA governing their working relationship, to investigate and consider evidence of employee drug use under the circumstances presented here. The instant case is fundamentally a labor dispute and is properly defined as a "minor dispute" within the meaning of the RLA, 45 U.S.C. § 151 a. Accordingly, Plaintiff's state-law claims are preempted and subject to dismissal for lack of subject matter jurisdiction because the RLA sets forth the exclusive mechanism for resolution of minor disputes.[2]

IV. Conclusion

For the foregoing reasons, Defendants' motion for summary judgment is GRANTED, and Plaintiff's complaint is dismissed.

s/Nancy G. Edmunds
U. S. District Judge

Dated: 21 Nov 2002

Footnotes

FN1. Mich. Comp. Laws Annot. § 37.2205a provides that:

> (1) An employer, employment agency, or labor organization, other than a law enforcement agency of this state or a political subdivision of this state, shall not in connection with an application for employment or membership, or in connection with the terms, conditions, or privileges of employment or membership request, make, or maintain a record of information regarding a misdemeanor arrest, detention, or disposition where a conviction did not result. A person is not guilty of perjury or otherwise for giving a false statement by failing to recite or acknowledge information the person has a civil right to withhold by this section. This section does not apply to information relative to a felony charge before conviction or dismissal.

FN2. In light of the above, there is no need to address Defendants' additional dismissal arguments; i.e., (1) that Michigan's Civil Rights Act provides solely for

employer liability, not individual employee liability; and (2) that the Act applies only to prospective rather than current employers.

No. 02- 72976
UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

James T. Roddy, Plaintiff

v.

Grand Trunk Western Railroad, Inc., et al. Defendants

JUDGMENT

The Court having reviewed the pleadings in this matter and being fully advised in the premises;

IT IS HEREBY ORDERED AND ADJUDGED that Defendants' motion for summary judgment is hereby GRANTED, and the case is DISMISSED.

So ORDERED.

Nancy G. Edmunds
U. S. District Judge

Dated: 21 Nov 2002

APPENDIX E

Award No. 15

National Mediation Board
Public Law Board

No. 6441

Canadian National Railway

And

United Transportation Union (GTW)
Grand Trunk Western Railway

Docket No. 1000-2001-UTU files
4465-R-GTW files

Case No. 15

Claimant: J.T. Roddy

For the Organization: Bruce Wigert, Vice President, UTU

For the Carrier: Sean McFarlin, CN-Manager Human Relations

Neutral: Dr. James R. McDonnell

STATEMENT OF CLAIM

Claim of Trainman, J.T. Roddy, for reinstatement to service with seniority rights unimpaired, with payment

of all time lost as a result of investigation held November 6, 2000, for alleged violation of Canadian National/Illinois U.S. Operating Rule "B" REPORTING AND COMPLYING WITH INSTRUCTIONS. Pay for all time lost including payment for all benefits, privileges and rights lost and expunging all notation of investigation from work record.

FINDINGS OF THE BOARD

The Board, upon the whole record an all evidence finds that the parties herein are Carrier and Employee within the meaning of the Railway Labor Act, as amended ("RLA"); that the Board is duly constituted by agreement, and has jurisdiction of the parties, claim and subject matter which was held on July 18, 2003 in Troy, Michigan. The Board makes the following additional findings.

DECISION

The Claimant has been an employee of the Carrier for 32 years prior to November 6, 2000. At that time he worked as a conductor.

On August 25, 2000, the Carrier sent a letter to the Claimant, which said, in part:

> #395 – Sixty (60) Day Suspension
> For conduct unbecoming an employee by being arrested for possession of a controlled substance at approximately 2100 hours on July 11, 2000, in violation of GTOR E, paragraph 2 and having your wife book you sick as a subterfuge to avoid

duty at 2140 hours on July 11, 2000.

In addition, you must undergo an EAP evaluation and fully comply with any recommendation developed from the evaluation. You must get a release from the EAP counselor and undergo a company medical examination before you will be allowed to return to service.

On October 13, 2000, the Carrier sent a letter to the Claimant, which said, in part:

Peter Brandon, Manager of Medical Services has informed me that you have failed to comply with the terms of your discipline assessed on August 4, 2000, which states as follows:

"In addition, you must undergo an EAP evaluation and fully comply with any recommendations developed from the evaluation. You must get a release from the EAP counselor and undergo a company medical examination before you will be allowed to return to service."

Per your conversation with Mr. Brandon on Thursday, October 12, 2000 at approximately 1:20 p.m., you were further informed that you MUST undergo the EAP Assessment and provide Mr. Brandon with a written report and any recommendations from the counselors. This information MUST be forwarded to Mr. Brandon no later than Monday, October 23, 2000. Failure to comply with the above instructions may result in further disciplinary actions.

The Claimant failed to comply with the letters and directives sent to him by the Carrier.

A formal investigation was held on November 6, 2000 and on November 28, 2000. Carrier issued a Notice of Discipline informing the Claimant that he had been dismissed from service.

The Carrier has carried its required burden of proof in the instant claim. The Claimant failed to comply with the requirements related to the EAP counselor procedures.

The Board, however, believes that the decision by the Carrier to dismiss the claimant from services is excessive. It seems that there are mitigating circumstances which must be taken into account.

At the time of the Claimant's arrest for charges noted above, the Claimant had a confrontation with a police officer. Claimant hired legal counsel who advised him that he should not sign a release from EAP and he did not.

Claimant was later cleared of the charges. But, advice of counsel kept him from completing the EAP requirements in a timely fashion. Thus, the Claimant caught between these two forces found himself in a dilemma.

A long term employee with an otherwise good work record will be given reasonable consideration by this Board.

The Board, therefore, concludes that the Claimant is

guilty of the charges, and will have a suspension from service for a period of three (3) months and will otherwise be made whole for wages, benefits and his seniority date.

AWARD

Claim sustained in accordance with the Decision.

ORDER

This Board hereby orders that an award favorable to the Claimant be made. The Carrier is ordered to make the Award effective on or before 30 days following the postmarked date the Award is transmitted to the parties.

Bruce Wigert, Vice President, UTU

Sean McFarlin, CN – Manager, LR

s/Dr. James R. McDonnell, Neutral

August 26, 2003
Date

APPENDIX F

No. 02-2499.

United States Court of Appeals
for the Sixth Circuit.

James T. RODDY, Plaintiff-Appellant,

v.

GRAND TRUNK WESTERN RAILROAD INCORPORATED, ET AL.

Filed: March 15, 2005

ORDER

BEFORE: MARTIN and ROGERS, Circuit Judges; and BELL,* District Judge.

The court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this court, and no judge of this court having requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied.

ENTERED BY ORDER OF THE COURT
s/Leonard Green, Clerk

Footnote
*Hon. Robert Holmes Bell, Chief United States District Judge for the Western District of Michigan, sitting by designation.

APPENDIX G

STATUTORY APPENDIX

1. Section 1331 of Title 28 of the United States Code, titled "Federal question," provides as follows:

> The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States.

2. Section 1441 of Title 28 of the United States Code, titled "Actions removable generally," provides as follows:

> (a) Except as otherwise expressly provided by Act of Congress, any civil action brought in a State court of which the district courts of the United States have original jurisdiction, may be removed by the defendant or the defendants, to the district court of the United States for the district and division embracing the place where such action is pending. For purposes of removal under this chapter, the citizenship of defendants sued under fictitious names shall be disregarded.
>
> (b) Any civil action of which the district courts have original jurisdiction founded on a claim or right arising under the Constitution, treaties or laws of the United States shall be removable without regard to the citizenship or residence of the parties. Any other such action shall be removable only if none of the parties in interest properly joined and served as defendants is a

citizen of the State in which such action is brought.

(c) Whenever a separate and independent claim or cause of action within the jurisdiction conferred by section 1331 of this title is joined with one or more otherwise non-removable claims or causes of action, the entire case may be removed and the district court may determine all issues therein, or, in its discretion, may remand all matters in which State law predominates.

(d) Any civil action brought in a State court against a foreign state as defined in section 1603(a) of this title may be removed by the foreign state to the district court of the United States for the district and division embracing the place where such action is pending. Upon removal the action shall be tried by the court without jury. Where removal is based upon this subsection, the time limitations of section 1446(b) of this chapter may be enlarged at any time for cause shown.

(e)

(1) Notwithstanding the provisions of subsection (b) of this section, a defendant in a civil action in a State court may remove the action to the district court of the United States for the district and division embracing the place where the action is pending if--

(A) the action could have been brought in a United States district

court under section 1369 of this title; or

(B) the defendant is a party to an action which is or could have been brought, in whole or in part, under section 1369 in a United States district court and arises from the same accident as the action in State court, even if the action to be removed could not have been brought in a district court as an original matter.

The removal of an action under this subsection shall be made in accordance with section 1446 of this title, except that a notice of removal may also be filed before trial of the action in State court within 30 days after the date on which the defendant first becomes a party to an action under section 1369 in a United States district court that arises from the same accident as the action in State court, or at a later time with leave of the district court.

(2) Whenever an action is removed under this subsection and the district court to which it is removed or transferred under section 1407(j) has made a liability determination requiring further proceedings as to damages, the district court shall remand the action to the State court from which it had been removed for

the determination of damages, unless the court finds that, for the convenience of parties and witnesses and in the interest of justice, the action should be retained for the determination of damages.

(3) Any remand under paragraph (2) shall not be effective until 60 days after the district court has issued an order determining liability and has certified its intention to remand the removed action for the determination of damages. An appeal with respect to the liability determination of the district court may be taken during that 60-day period to the court of appeals with appellate jurisdiction over the district court. In the event a party files such an appeal, the remand shall not be effective until the appeal has been finally disposed of. Once the remand has become effective, the liability determination shall not be subject to further review by appeal or otherwise.

(4) Any decision under this subsection concerning remand for the determination of damages shall not be reviewable by appeal or otherwise.

(5) An action removed under this subsection shall be deemed to be an action under section 1369 and an action in which jurisdiction is based on section 1369 of this title for purposes of this section and sections 1407, 1697, and 1785 of this title.

(6) Nothing in this subsection shall restrict the authority of the district court to transfer or dismiss an action on the ground of inconvenient forum.

(f) The court to which a civil action is removed under this section is not precluded from hearing and determining any claim in such civil action because the State court from which such civil action is removed did not have jurisdiction over that claim.

3. Section 151 of Title 45 of the United States Code, titled "Definitions; short title," provides as follows:

When used in this chapter and for the purposes of this chapter--

First. The term "carrier" includes any railroad subject to the jurisdiction of the Surface Transportation Board, any express company that would have been subject to subtitle IV of Title 49, as of December 31, 1995, and any company which is directly or indirectly owned or controlled by or under common control with any carrier by railroad and which operates any equipment or facilities or performs any service (other than trucking service) in connection with the transportation, receipt, delivery, elevation, transfer in transit, refrigeration or icing, storage, and handling of property transported by railroad, and any receiver, trustee, or other individual or body, judicial or otherwise, when in the possession of the business of any such "carrier": *Provided, however*, That the term

"carrier" shall not include any street, interurban, or suburban electric railway, unless such railway is operating as a part of a general steam-railroad system of transportation, but shall not exclude any part of the general steam-railroad system of transportation now or hereafter operated by any other motive power. The Surface Transportation Board is authorized and directed upon request of the Mediation Board or upon complaint of any party interested to determine after hearing whether any line operated by electric power falls within the terms of this proviso. The term "carrier" shall not include any company by reason of its being engaged in the mining of coal, the supplying of coal to a carrier where delivery is not beyond the mine tipple, and the operation of equipment or facilities therefor, or in any of such activities.

Second. The term "Adjustment Board" means the National Railroad Adjustment Board created by this chapter.

Third. The term "Mediation Board" means the National Mediation Board created by this chapter.

Fourth. The term "commerce" means commerce among the several States or between any State, Territory, or the District of Columbia and any foreign nation, or between any Territory or the District of Columbia and any State, or between any Territory and any other Territory, or between any Territory and the District of Columbia, or within any Territory or the District

of Columbia, or between points in the same State but through any other State or any Territory or the District of Columbia or any foreign nation.

Fifth. The term "employee" as used herein includes every person in the service of a carrier (subject to its continuing authority to supervise and direct the manner of rendition of his service) who performs any work defined as that of an employee or subordinate official in the orders of the Surface Transportation Board now in effect, and as the same may be amended or interpreted by orders hereafter entered by the Board pursuant to the authority which is conferred upon it to enter orders amending or interpreting such existing orders: *Provided, however,* That no occupational classification made by order of the Surface Transportation Board shall be construed to define the crafts according to which railway employees may be organized by their voluntary action, nor shall the jurisdiction or powers of such employee organizations be regarded as in any way limited or defined by the provisions of this chapter or by the orders of the Board.

The term "employee" shall not include any individual while such individual is engaged in the physical operations consisting of the mining of coal, the preparation of coal, the handling (other than movement by rail with standard railroad locomotives) of coal not beyond the mine tipple, or the loading of coal at the tipple.

Sixth. The term "representative" means any person or persons, labor union, organization, or

corporation designated either by a carrier or group of carriers or by its or their employees, to act for it or them.

Seventh. The term "district court" includes the United States District Court for the District of Columbia; and the term "court of appeals" includes the United States Court of Appeals for the District of Columbia.

This chapter may be cited as the "Railway Labor Act."

4. Section 151(a) of Title 45 of the United States Code, titled "General purposes," provides as follows:

The purposes of the chapter are:

(1) To avoid any interruption to commerce or to the operation of any carrier engaged therein;

(2) to forbid any limitation upon freedom of association among employees or any denial, as a condition of employment or otherwise, of the right of employees to join a labor organization;

(3) to provide for the complete independence of carriers and of employees in the matter of self-organization to carry out the purposes of this chapter;
(4) to provide for the prompt and orderly settlement of all disputes concerning rates of pay, rules, or working conditions;

> (5) to provide for the prompt and orderly settlement of all disputes growing out of grievances or out of the interpretation or application of agreements covering rates of pay, rules, or working conditions.

5. Section 153 of Title 45 of the United States Code, entitled "National Railroad Adjustment Board," provides as follows:

> **First.** Establishment; composition; powers and duties; divisions; hearings and awards; judicial review.
>
> There is established a Board, to be known as the "National Railroad Adjustment Board", the members of ~~which~~ shall be selected within thirty days after June 21, 1934, and it is provided—
>
> > (a) That the said Adjustment Board shall consist of thirty-four members, seventeen of whom shall be selected by the carriers and seventeen by such labor organizations of the employees, national in scope, as have been or may be organized in accordance with the provisions of sections 151a and 152 of this title.
> >
> > (b) The carriers, acting each through its board of directors or its receiver or receivers, trustee or trustees, or through an officer or officers designated for that purpose by such board, trustee or

trustees, or receiver or receivers, shall prescribe the rules under which its representatives shall be selected and shall select the representatives of the carriers on the Adjustment Board and designate the division on which each such representative shall serve, but no carrier or system of carriers shall have more than one voting representative on any division of the Board.

(c) Except as provided in the second paragraph of subsection (h) of this section, the national labor organizations, as defined in paragraph (a) of this section, acting each through the chief executive or other medium designated by the organization or association thereof, shall prescribe the rules under which the labor members of the Adjustment Board shall be selected and shall select such members and designate the division on which each member shall serve; but no labor organization shall have more than one voting representative on any division of the Board.

(d) In case of a permanent or temporary vacancy on the Adjustment Board, the vacancy shall be filled by selection in the same manner as in the original selection.

(e) If either the carriers or the labor organizations of the employees fail to select and designate representatives to

the Adjustment Board, as provided in paragraphs (b) and (c) of this section, respectively, within sixty days after June 21, 1934, in case of any original appointment to office of a member of the Adjustment Board, or in case of a vacancy in any such office within thirty days after such vacancy occurs, the Mediation Board shall thereupon directly make the appointment and shall select an individual associated in interest with the carriers or the group of labor organizations of employees, whichever he is to represent.

(f) In the event a dispute arises as to the right of any national labor organization to participate as per paragraph (c) of this section in the selection and designation of the labor members of the Adjustment Board, the Secretary of Labor shall investigate the claim of such labor organization to participate, and if such claim in the judgment of the Secretary of Labor has merit, the Secretary shall notify the Mediation Board accordingly, and within ten days after receipt of such advice the Mediation Board shall request those national labor organizations duly qualified as per paragraph (c) of this section to participate in the selection and designation of the labor members of the Adjustment Board to select a representative. Such representative, together with a representative likewise

designated by the claimant, and a third or neutral party designated by the Mediation Board, constituting a board of three, shall within thirty days after the appointment of the neutral member, investigate the claims of the labor organization desiring participation and decide whether or not it was organized in accordance with sections 151a and 152 of this title and is otherwise properly qualified to participate in the selection of the labor members of the Adjustment Board, and the findings of such boards of three shall be final and binding.

(g) Each member of the Adjustment Board shall be compensated by the party or parties he is to represent. Each third or neutral party selected under the provisions of paragraph (f) of this section shall receive from the Mediation Board such compensation as the Mediation Board may fix, together with his necessary traveling expenses and expenses actually incurred for subsistence, or per diem allowance in lieu thereof, subject to the provisions of law applicable thereto, while serving as such third or neutral party.

(h) The said Adjustment Board shall be composed of four divisions, whose proceedings shall be independent of one another, and the said divisions as well as

the number of their members shall be as follows:

> First division: To have jurisdiction over disputes involving train- and yard-service employees of carriers; that is, engineers, firemen, hostlers, and outside hostler helpers, conductors, trainmen, and yard-service employees. This division shall consist of eight members, four of whom shall be selected and designated by the carriers and four of whom shall be selected and designated by the labor organizations, national in scope and organized in accordance with sections 151a and 152 of this title and which represent employees in engine, train, yard, or hostling service: *Provided, however*, That each labor organization shall select and designate two members on the First Division and that no labor organization shall have more than one vote in any proceedings of the First Division or in the adoption of any award with respect to any dispute submitted to the First Division: *Provided further, however*, That the carrier members of the First Division shall cast no more than two votes in any proceedings of the division or in

the adoption of any award with respect to any dispute submitted to the First Division.

Second division: To have jurisdiction over disputes involving machinists, boilermakers, blacksmiths, sheet-metal workers, electrical workers, carmen, the helpers and apprentices of all the foregoing, coach cleaners, power-house employees, and railroad-shop laborers. This division shall consist of ten members, five of whom shall be selected by the carriers and five by the national labor organizations of the employees.

Third division: To have jurisdiction over disputes involving station, tower, and telegraph employees, train dispatchers, maintenance-of-way men, clerical employees, freight handlers, express, station, and store employees, signal men, sleeping-car conductors, sleeping-car porters, and maids and dining-car employees. This division shall consist of ten members, five of whom shall be selected by the carriers and five by the national labor organizations of employees.

Fourth division: To have

jurisdiction over disputes involving employees of carriers directly or indirectly engaged in transportation of passengers or property by water, and all other employees of carriers over which jurisdiction is not given to the first, second, and third divisions. This division shall consist of six members, three of whom shall be selected by the carriers and three by the national labor organizations of the employees.

(i) The disputes between an employee or group of employees and a carrier or carriers growing out of grievances or out of the interpretation or application of agreements concerning rates of pay, rules, or working conditions, including cases pending and unadjusted on June 21, 1934, shall be handled in the usual manner up to and including the chief operating officer of the carrier designated to handle such disputes; but, failing to reach an adjustment in this manner, the disputes may be referred by petition of the parties or by either party to the appropriate division of the Adjustment Board with a full statement of the facts and all supporting data bearing upon the disputes.

(j) Parties may be heard either in person,

by counsel, or by other representatives, as they may respectively elect, and the several divisions of the Adjustment Board shall give due notice of all hearings to the employee or employees and the carrier or carriers involved in any disputes submitted to them.

(k) Any division of the Adjustment Board shall have authority to empower two or more of its members to conduct hearings and make findings upon disputes, when properly submitted, at any place designated by the division: *Provided, however,* That except as provided in paragraph (h) of this section, final awards as to any such dispute must be made by the entire division as hereinafter provided.

(l) Upon failure of any division to agree upon an award because of a deadlock or inability to secure a majority vote of the division members, as provided in paragraph (n) of this section, then such division shall forthwith agree upon and select a neutral person, to be known as "referee", to sit with the division as a member thereof, and make an award. Should the division fail to agree upon and select a referee within ten days of the date of the deadlock or inability to secure a majority vote, then the division, or any member thereof, or the parties or either party to the dispute may certify that fact

to the Mediation Board, which Board shall, within ten days from the date of receiving such certificate, select and name the referee to sit with the division as a member thereof and make an award. The Mediation Board shall be bound by the same provisions in the appointment of these neutral referees as are provided elsewhere in this chapter for the appointment of arbitrators and shall fix and pay the compensation of such referees.

(m) The awards of the several divisions of the Adjustment Board shall be stated in writing. A copy of the awards shall be furnished to the respective parties to the controversy, and the awards shall be final and binding upon both parties to the dispute. In case a dispute arises involving an interpretation of the award, the division of the Board upon request of either party shall interpret the award in the light of the dispute.

(n) A majority vote of all members of the division of the Adjustment Board eligible to vote shall be competent to make an award with respect to any dispute submitted to it.

(o) In case of an award by any division of the Adjustment Board in favor of petitioner, the division of the Board shall make an order, directed to the carrier, to

make the award effective and, if the award includes a requirement for the payment of money, to pay to the employee the sum to which he is entitled under the award on or before a day named. In the event any division determines that an award favorable to the petitioner should not be made in any dispute referred to it, the division shall make an order to the petitioner stating such determination.

(p) If a carrier does not comply with an order of a division of the Adjustment Board within the time limit in such order, the petitioner, or any person for whose benefit such order was made, may file in the District Court of the United States for the district in which he resides or in which is located the principal operating office of the carrier, or through which the carrier operates, a petition setting forth briefly the causes for which he claims relief, and the order of the division of the Adjustment Board in the premises. Such suit in the District Court of the United States shall proceed in all respects as other civil suits, except that on the trial of such suit the findings and order of the division of the Adjustment Board shall be conclusive on the parties, and except that the petitioner shall not be liable for costs in the district court nor for costs at any subsequent stage of the proceedings, unless they accrue upon his appeal, and

such costs shall be paid out of the appropriation for the expenses of the courts of the United States. If the petitioner shall finally prevail he shall be allowed a reasonable attorney's fee, to be taxed and collected as a part of the costs of the suit. The district courts are empowered, under the rules of the court governing actions at law, to make such order and enter such judgment, by writ of mandamus or otherwise, as may be appropriate to enforce or set aside the order of the division of the Adjustment Board: *Provided, however,* That such order may not be set aside except for failure of the division to comply with the requirements of this chapter, for failure of the order to conform, or confine itself, to matters within the scope of the division's jurisdiction, or for fraud or corruption by a member of the division making the order.

(q) If any employee or group of employees, or any carrier, is aggrieved by the failure of any division of the Adjustment Board to make an award in a dispute referred to it, or is aggrieved by any of the terms of an award or by the failure of the division to include certain terms in such award, then such employee or group of employees or carrier may file in any United States district court in which a petition under paragraph (p) could be filed, a petition for review of the

division's order. A copy of the petition shall be forthwith transmitted by the clerk of the court to the Adjustment Board. The Adjustment Board shall file in the court the record of the proceedings on which it based its action. The court shall have jurisdiction to affirm the order of the division, or to set it aside, in whole or in part, or it may remand the proceedings to the division for such further action as it may direct. On such review, the findings and order of the division shall be conclusive on the parties, except that the order of the division may be set aside, in whole or in part, or remanded to the division, for failure of the division to comply with the requirements of this chapter, for failure of the order to conform, or confine itself, to matters within the scope of the division's jurisdiction, or for fraud or corruption by a member of the division making the order. The judgment of the court shall be subject to review as provided in sections 1291 and 1254 of Title 28.

(r) All actions at law based upon the provisions of this section shall be begun within two years from the time the cause of action accrues under the award of the division of the Adjustment Board, and not after.

(s) The several divisions of the Adjustment Board shall maintain

headquarters in Chicago, Illinois, meet regularly, and continue in session so long as there is pending before the division any matter within its jurisdiction which has been submitted for its consideration and which has not been disposed of.

(t) Whenever practicable, the several divisions or subdivisions of the Adjustment Board shall be supplied with suitable quarters in any Federal building located at its place of meeting.

(u) The Adjustment Board may, subject to the approval of the Mediation Board, employ and fix the compensations of such assistants as it deems necessary in carrying on its proceedings. The compensation of such employees shall be paid by the Mediation Board.

(v) The Adjustment Board shall meet within forty days after June 21, 1934, and adopt such rules as it deems necessary to control proceedings before the respective divisions and not in conflict with the provisions of this section. Immediately following the meeting of the entire Board and the adoption of such rules, the respective divisions shall meet and organize by the selection of a chairman, a vice chairman, and a secretary. Thereafter each division shall annually designate one of its members to act as chairman and one of its members to act as

vice chairman: *Provided, however*, That the chairmanship and vice-chairmanship of any division shall alternate as between the groups, so that both the chairmanship and vice-chairmanship shall be held alternately by a representative of the carriers and a representative of the employees. In case of a vacancy, such vacancy shall be filled for the unexpired term by the selection of a successor from the same group.

(w) Each division of the Adjustment Board shall annually prepare and submit a report of its activities to the Mediation Board, and the substance of such report shall be included in the annual report of the Mediation Board to the Congress of the United States. The reports of each division of the Adjustment Board and the annual report of the Mediation Board shall state in detail all cases heard, all actions taken, the names, salaries, and duties of all agencies, employees, and officers receiving compensation from the United States under the authority of this chapter, and an account of all moneys appropriated by Congress pursuant to the authority conferred by this chapter and disbursed by such agencies, employees, and officers.

(x) Any division of the Adjustment Board shall have authority, in its discretion, to establish regional adjustment boards to

act in its place and stead for such limited period as such division may determine to be necessary. Carrier members of such regional boards shall be designated in keeping with rules devised for this purpose by the carrier members of the Adjustment Board and the labor members shall be designated in keeping with rules devised for this purpose by the labor members of the Adjustment Board. Any such regional board shall, during the time for which it is appointed, have the same authority to conduct hearings, make findings upon disputes and adopt the same procedure as the division of the Adjustment Board appointing it, and its decisions shall be enforceable to the same extent and under the same processes. A neutral person, as referee, shall be appointed for service in connection with any such regional adjustment board in the same circumstances and manner as provided in paragraph (*l*) of this section, with respect to a division of the Adjustment Board.

Second. System, group, or regional boards: establishment by voluntary agreement; special adjustment boards: establishment, composition, designation of representatives by Mediation Board, neutral member, compensation, quorum, finality and ~~enforcement~~ of awards.

Nothing in this section shall be construed to prevent any individual carrier, system, or group of carriers and any class or classes of its or their employees, all acting through their representatives, selected in accordance with the provisions of this chapter, from mutually agreeing to the establishment of system, group, or regional boards of adjustment for the purpose of adjusting and deciding disputes of the character specified in this section. In the event that either party to such a system, group, or regional board of adjustment is dissatisfied with such arrangement, it may upon ninety days' notice to the other party elect to come under the jurisdiction of the Adjustment Board.

If written request is made upon any individual carrier by the representative of any craft or class of employees of such carrier for the establishment of a special board of adjustment to resolve disputes otherwise referable to the Adjustment Board, or any dispute which has been pending before the Adjustment Board for twelve months from the date the dispute (claim) is received by the Board, or if any carrier makes such a request upon any such representative, the carrier or the representative upon whom such request is made shall join in an agreement establishing such a board within thirty days from the date such request is made. The cases which may be considered by such board shall be defined in the agreement establishing it. Such board shall consist of one person designated by the carrier and one person designated by the representative of the employees. If such carrier

or such representative fails to agree upon the establishment of such a board as provided herein, or to exercise its rights to designate a member of the board, the carrier or representative making the request for the establishment of the special board may request the Mediation Board to designate a member of the special board on behalf of the carrier or representative upon whom such request was made. Upon receipt of a request for such designation the Mediation Board shall promptly make such designation and shall select an individual associated in interest with the carrier or representative he is to represent, who, with the member appointed by the carrier or representative requesting the establishment of the special board, shall constitute the board. Each member of the board shall be compensated by the party he is to represent. The members of the board so designated shall determine all matters not previously agreed upon by the carrier and the representative of the employees with respect to the establishment and jurisdiction of the board. If they are unable to agree such matters shall be determined by a neutral member of the board selected or appointed and compensated in the same manner as is hereinafter provided with respect to situations where the members of the board are unable to agree upon an award. Such neutral member shall cease to be a member of the board when he has determined such matters. If with respect to any dispute or group of disputes the members of the board designated by the carrier and the representative are unable to agree upon

an award disposing of the dispute or group of disputes they shall by mutual agreement select a neutral person to be a member of the board for the consideration and disposition of such dispute or group of disputes. In the event the members of the board designated by the parties are unable, within ten days after their failure to agree upon an award, to agree upon the selection of such neutral person, either member of the board may request the Mediation Board to appoint such neutral person and upon receipt of such request the Mediation Board shall promptly make such appointment. The neutral person so selected or appointed shall be compensated and reimbursed for expenses by the Mediation Board. Any two members of the board shall be competent to render an award. Such awards shall be final and binding upon both parties to the dispute and if in favor of the petitioner, shall direct the other party to comply therewith on or before the day named. Compliance with such awards shall be enforcible by proceedings in the United States district courts in the same manner and subject to the same provisions that apply to proceedings for enforcement of compliance with awards of the Adjustment Board.

MOTION FILED

AUG 19 2005

No. 05-106

IN THE

Supreme Court of the United States

GRAND TRUNK WESTERN RAILROAD INC., *et al.*,
Petitioners,

v.

JAMES T. RODDY,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

MOTION FOR LEAVE TO FILE AND BRIEF OF *AMICI CURIAE* AIRLINE INDUSTRIAL RELATIONS CONFERENCE, ASSOCIATION OF AMERICAN RAILROADS, AND NATIONAL RAILWAY LABOR CONFERENCE IN SUPPORT OF PETITIONERS

HARRY A. RISSETTO *
RALPH J. MOORE, JR.
THOMAS E. REINERT, JR.
JONATHAN C. FRITTS
MORGAN, LEWIS
BOCKIUS LLP
1111 Pennsylvania Ave., N.W.
Washington, D.C. 20004
(202) 739-3000

* Counsel of Record

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20001

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MOTION FOR LEAVE TO FILE BRIEF *AMICI CURIAE* IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

Pursuant to Supreme Court Rule 37.2, the Airline Industrial Relations Conference ("AIRCON"), the Association of American Railroads ("AAR"), and the National Railway Labor Conference ("NRLC") move for leave to file the attached brief as *amici curiae* in support of the Petition for a Writ of Certiorari. The *amici* are filing this motion because the Respondent has refused to consent to the filing of this brief. Petitioners have consented to the filing of this brief and their letter of consent has been lodged with the Clerk of the Court.

The *amici* seek to file the attached brief to emphasize the importance of the question presented in this case to the airline and railroad industries in the United States—the two industries whose labor relations are regulated by the Railway

Labor Act. The question presented affects the integrity of the Act's compulsory framework for the resolution of labor disputes, and hence the stability of labor relations in two industries that Congress deemed critical to the national economy. The *amici* represent the collective views of the Nation's major air and rail carriers.

AIRCON was formed in 1946 as a voluntary association of various passenger and air cargo carriers.[1] AIRCON's purpose is to facilitate the exchange of ideas and information concerning personnel and labor relations issues and to represent member carriers, who collectively operate in 49 states, concerning legislative, judicial and administrative matters. AIRCON has submitted *amicus* briefs in this Court in numerous cases, including *US Airways, Inc. v. Barnett*, 535 U.S. 391 (2002); *Eastern Associated Coal Corp. v. United Mine Workers, Dist. 17*, 531 U.S. 57 (2000); *Trans World Airlines, Inc. v. Independent Federation of Flight Attendants*, 489 U.S. 426 (1989); and *Northwest Airlines, Inc. v. Air Line Pilots Ass'n*, 486 U.S. 1014 (1988).

AAR is a trade association whose membership includes freight railroads that operate 77 percent of the line-haul mileage, employ 92 percent of the workers, and account for 94 percent of the freight revenue of all railroads in the United States; and passenger railroads that operate intercity passenger trains and provide commuter rail service. It represents its members in connection with numerous administrative, legislative, and judicial matters. AAR has submitted *amicus* briefs in this Court in numerous cases, including *Norfolk*

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[1] AIRCON's current members include: ABX Air, Inc., AirTran Airways, Alaska Airlines, Inc., Aloha Airlines, Inc., America West Airlines, American Airlines, Inc., ASTAR Air Cargo, Inc., ATA, Continental Air Lines, Inc., Delta Air Lines, Inc., Federal Express Corp., Frontier Airlines, Inc., Hawaiian Airlines, Inc., Independence Air, jetBlue Airways, Northwest Airlines, Inc., Southwest Airlines, United Airlines, United Parcel Service, and US Airways.

Southern Ry. Co. v. Kirby, 125 S. Ct. 385 (2004); *Norfolk & Western Ry. Co. v. Ayers*, 538 U.S. 135 (2003); and *Norfolk Southern Ry. Co. v. Shanklin*, 529 U.S. 344 (2000).

The members of the NRLC include all United States Class I freight railroads and many smaller lines.[2] The NRLC, through its National Carriers' Conference Committee, represents most of its members in multi-employer collective bargaining with the major rail labor organizations. It also advises railroads on labor-related matters; administers industry-wide health and welfare plans for rail employees; represents the industry on rail labor issues before congressional committees, other governmental bodies, and the courts; provides training programs; and represents railroads in labor arbitration cases before the National Railroad Adjustment Board and other tribunals. NRLC has filed briefs as *amicus curiae* in numerous cases before this Court, including *Brown v. Pro Football*, 518 U.S. 231 (1996); and *Conrail v. RLEA*, 491 U.S. 299 (1989).

Because the *amici* represent virtually all of the major air and rail carriers covered by the Railway Labor Act, the views of the *amici* expressed in the attached brief will assist the Court in understanding the scope and impact of the decision below. The decision of the court below exacerbates a conflict among the Courts of Appeals concerning the jurisdiction of federal courts to decide whether a claim filed in state court constitutes a "minor dispute" that must be resolved through the grievance arbitration procedures mandated by Congress. Federal jurisdiction is essential to ensure that these disputes are consistently and finally resolved through the Act's dispute resolution procedures, rather than through a multitude of state

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[2] The Class I freight railroads include BNSF Railway Co., Soo Line Railroad Co., Canadian National Railway Co., CSX Transportation, Inc., Kansas City Southern Railway Co., Norfolk Southern Railway Co., and Union Pacific Railroad Co.

court litigation. By holding that no such federal jurisdiction exists, the court below has threatened the stability of labor relations in the airline and railroad industries. That is why the *amici* seek leave to file the attached brief urging the Court to grant the Petition.

Respectfully submitted,

HARRY A. RISSETTO *
RALPH J. MOORE, JR.
THOMAS E. REINERT, JR.
JONATHAN C. FRITTS
MORGAN, LEWIS
BOCKIUS LLP
1111 Pennsylvania Ave., N.W.
Washington, D.C. 20004
(202) 739-3000

* Counsel of Record

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BRIEF *AMICI CURIAE* IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

STATEMENT OF INTEREST[1]

The interests of the *amici* are set forth in the preceding motion and therefore are not repeated here.

SUMMARY OF THE ARGUMENT

The question presented in the Petition is important to the stability of labor relations on the Nation's airlines and railroads and to the administration of the Railway Labor Act ("RLA" or "Act"). Labor relations stability in the air and rail industries depends in large part on the Act's mandatory

[1] Pursuant to S. Ct. R. 37.6, the *amici* state that counsel for a party did not author this brief in whole or in part and that no one other than the *amici*, their members, or counsel made a monetary contribution to the preparation or submission of this brief.

grievance arbitration procedures. Disputes involving the interpretation or application of a collective bargaining agreement (so-called "minor disputes") must be resolved in a uniform and consistent manner. The RLA's mandatory grievance arbitration procedures are the mechanism for ensuring uniformity and consistency—and ultimately labor peace—in two industries Congress has deemed critical to the national economy. This dispute resolution system, carefully crafted by Congress to avoid interruptions to commerce, is jeopardized if disputes that should be resolved through the Act's grievance arbitration procedures are instead resolved in collateral litigation in a different forum.

Ensuring that federal courts have jurisdiction to determine what kinds of disputes are subject to mandatory arbitration under the Act, and thus are removable from state court, is essential to the Act's proper administration. It makes the federal courts available to be the gatekeepers for the grievance arbitration process, and thereby reduces the risk that inconsistent adjudication will lead to disparate treatment of similarly situated employees—a potential source of labor discord that the Act was designed to prevent. To provide for uniform application of the RLA, the critical threshold determination of whether a dispute is a "minor dispute" should be made by federal courts that deal more regularly with the conceptual intricacies of "minor disputes" under the Act. By applying a different standard, the court below exacerbates a conflict among the Courts of Appeals and further increases the likelihood of forum-shopping by litigants who seek to avoid the mandatory minor dispute resolution procedures that are essential to the Act's proper administration.

ARGUMENT

I. FEDERAL JURISDICTION IS ESSENTIAL TO THE ORDERLY RESOLUTION OF DISPUTES UNDER THE RLA.

Labor relations stability in the air and rail industries depends on the resolution of "minor disputes"—disputes involving the interpretation or application of a collective bargaining agreement—through the RLA's grievance arbitration procedures. Federal jurisdiction is essential to fulfilling that fundamental purpose.

A. The RLA Establishes Mandatory Dispute Resolution Procedures.

The Act's primary purpose is to "avoid any interruption to commerce or to the operation of any carrier engaged therein." 45 U.S.C. § 151a. To further that goal, Congress established a framework "to provide for the prompt and orderly settlement of *all* disputes growing out of grievances or out of the interpretation or application of agreements involving rates of pay, rules, or working conditions." *Id.* (emphasis added). As this Court held in *Hawaiian Airlines, Inc. v. Norris*, 512 U.S. 246 (1994), "Congress' purpose in passing the RLA was to promote stability in labor-management relations by providing a comprehensive framework for resolving labor disputes." *Id.* at 252.

Use of the RLA's dispute resolution procedures is mandatory. In *Brotherhood of Railroad Trainmen v. Chicago River & Indiana R.R. Co.*, 353 U.S. 30 (1957), this Court held that federal courts have jurisdiction to compel use of the National Railroad Adjustment Board procedures to resolve disputes involving the interpretation or application of a collective bargaining agreement (*i.e.*, "minor disputes"). *See also Andrews v. Louisville & Nashville R.R. Co.*, 406 U.S.

320 (1972) (confirming that grievance and arbitration procedures for minor disputes under the RLA are compulsory).

Similarly, the Act requires air carriers and their employees, through their selected representatives, to establish adjustment boards to resolve minor disputes. 45 U.S.C. § 184. The duty to use adjustment boards to resolve minor disputes in the airline industry is likewise enforceable in federal court. *See International Ass'n of Machinists v. Central Airlines, Inc.*, 372 U.S. 682 (1963).

B. The Act Discourages the Fragmentation of Labor Disputes on a Local or State-by-State Basis.

The Act centralizes labor relations throughout a carrier's system to minimize the number and frequency of disputes that could interfere with the smooth flow of passengers and goods by air or rail. Indeed, air and rail transportation systems are inherently interstate in scope, with resulting systemwide or national labor relations schemes. The Act resists the fragmentation of disputes which may threaten labor peace by establishing bargaining relationships and dispute resolution procedures on a nationwide basis.

Under the RLA, unions are certified to represent employees of air and rail carriers in systemwide—*i.e.*, nationwide—crafts or classes determined by the National Mediation Board ("NMB"). *See American Airlines, Inc.*, 19 NMB 113, 126 (1991) ("The Board has long held that representation elections must include a carrier's entire system."); *Pennsylvania Railroad Co.*, 1 NMB 23, 24 (1937) ("The Railway Labor Act does not authorize the National Mediation Board to certify representatives for small groups of employees arbitrarily selected. Representatives may be designated and authorized only for the whole of a craft or class employed by a carrier.").